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LEADING ARTICLES

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MISSISSIPPI LAW JOURNAL

JOURNAL *of the* MISSISSIPPI STATE BAR

Vol. V FEBRUARY, 1933 No. 2

RIGHTS OF THE LANDLORD

By William A. Schmitt*

The rights of the landlord in Mississippi with respect to priority of payment out of the goods and chattels upon the leased premises for not more than one year's rent, in common with many of her sister states, have not been so definitely settled as to prevent confusion in the minds of laymen and lawyers. It is to direct attention to some of the points in dispute that this article is written, in the hope that a judicial pronouncement will soon be made which will enable the practitioner to give advice to his client which does not carry with it the very active germ of an expensive law suit.

Section 2175 of the Mississippi Code of 1930 reads as follows:

"Goods not to be removed until rent paid.—No goods or chattels, lying or being in or upon any messuage, lands or tenements, leased or rented for life, years, at will, or otherwise, shall at any time be liable to be taken by virtue of any writ of execution, or other process whatever, unless the party so taking the same shall, before the removal of the goods or chattels from such premises, pay or tender to the landlord or lessor thereof, all the unpaid rent for the said premises, whether the day of payment shall have come or not, provided it shall not amount to more than one year's rent; and the party suing out such execution or other process, paying or tendering to such landlord or lessor the rent unpaid, not to exceed one year's rent, may proceed to execute his judgment or process; and the officer levying the same shall be empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the money due under the process, and when the rent contracted for is payable, not in money, but in other things, the creditor shall pay the landlord the money value of such things."[1]

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1 The author does not have access to the first territorial compilation of 1799 prepared under the direction of Governor Winthrop Sargent nor to Toulmin's Code of 1807. In framing laws for the new territory Governor Sargent

The foregoing statute appears in every Code of Mississippi with the exception of the Code of 1892 when same was probably omitted through oversight. It has its counter part in the statutes of other states,[2] and for that reason decisions from the highest courts of other jurisdictions may throw some light upon the interpretation and construction to be given our own statute.

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complained "At the want of the laws of the several states, as we must be compelled to form our Code from the Volumes of the Northwestern Territory, which I can by no means believe a very good basis." He later received the laws of New Hampshire, North Carolina and Kentucky. Judge Toulmin was a native of England and attained eminence as a member of the Kentucky Bar, where he compiled the Acts of the State before coming to Mississippi as a Territorial Judge about 1805. A year later he had completed his Code but the General Assembly made some amendments and alterations before adopting it in 1807, and it embraced all the laws passed at that session, including the statute under consideration. The section appears in paragraph XXXV in the Chapter on Courts of the Statutes of Mississippi Territory of 1816 compiled by Edward Turner. It next appears in Poindexter's Code of 1823 in Chapter 27 under the title, Executions, Section 24, page 201. The wording is the same in Hutchinson's Code of 1848. In both of these Codes the language is slightly different from Section 2175. In the latter Code it is stated that before removal of the goods or chattels from the premises they must pay or tender to the landlord "all the unpaid rent for the said premises, whether the day of payment shall have come or not," while the first Code states that they shall pay or tender all money "due for rent on the said premises at the time of taking such goods and chattels in execution."

The Poindexter Code was the first State Code, but, as noted, there were three other Codes of Mississippi during its Territorial period. Judge R. H. Thompson in an article on the Codes of the State remarked that Governor Poindexter "like most natives of the Old Dominion State, he revered Virginia, her laws and institutions, and it is said that in preparing his Code he largely incorporated into our laws the statutes of that State, taking the then Code of Virginia as his model for the preparation of the one for this State." Probably the same could be said of Judge Turner; but whether Toulmin took his inspiration from Kentucky or Virginia is not clear.

2 State statutes vary in nomenclature; some give the landlord a "superior" lien (Kentucky); others distinguish between a "special and general" lien (Georgia); some state it is a "preference" lien (Texas); while another designates it as a "tacit" lien (District of Columbia).

Sections 7 and 8 of the Virginia Acts of 1818 were based on 8 Anne c.14, Sec. 1, and form the present statute of that State. Sec. 2792 Code 1887; Sec. 5524 Code 1919. It was passed on as early as 1846 in the case of Geiger v. Harmon, 3 Grat 130. It is presumed that the statute appeared before 1818 but it is not known whether it was accessible to our earlier compilers.

"In Bracton's day (1268) the lord when the services are in arrear has three courses open to him. *** (2) the lord's handiest remedy is that of distraining his tenant to perform the services that are in arrear. This means that, carefully observing certain rules as to when and where and what he may seize he takes the chattels that are found upon the tenement and keeps them until the tenant either tenders the arrears or finds security to contest in a court of law the justice of the seizure. The idea of distress (districtio) is that of bringing compulsion to bear upon a person who is thereby to be forced into doing something or leaving something undone; it is not a means whereby the distrainer can satisfy the debt that is due to him. He may not appropriate the namium, the thing that he has taken, nor may he sell it; he must keep it as a gage (vadium) so that the person from whom it has been taken may be constrained to perform his duty. This right to distrain for services in arrear is in the later half of the 13th Century a right that is freely exercised by every

The two leading cases of *Marye v. Dyche,* 42 Miss. 347 (1869) and *Stamps v. Gilman & Company,* 43 Miss. 456 are worthy of extensive quotation. In the first case, Wadlington and Dyche leased a plantation from M. P. Marye, in 1867 and in May of that year they executed a mortgage to another party upon the crops and live stock to secure advances, the instrument stating that the mortgagee could take possession upon default by December 1. The mortgage was recorded. J. T. Dyche made advances during the year to farm the property and took a promissory note for same which was duly enrolled on December 12. On December 16 M. P. Marye sued out an attachment for rent and levy was made on the crops and live stock found on the property. The Court said:

"The main question presented by this record for our consideration is, Has the landlord a prior right or superior claim to have satisfaction of his debt for rent out of the property of his tenant to that of any other creditor by mortgage or of one having a specific lien in writing on the property of the tenant enterior to the levy of the attachment on the same for rent? *** The common law process of distress does not exist in this State. The whole policy of the law respecting distresses for rent has been changed by our Statute and a distress, for that purpose is now no more than a summary method of seizing under a writ of attachment, the tenants property and selling the same to satisfy the rent which he owes.[3] *** Rent is not per se a lien on goods found on the demised premises. It binds as a lien only when the goods are seized under an attachment for rent. *** The Statute prohibits the judgment creditors of the tenant from taking the goods and chattels on the demised premises by virtue of a writ of execution unless the party so taking the same shall before the removal of the goods off such premises pay or tender to the landlord, or lessor thereof, all money due for the rent of the said

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landlord, and he exercises it although he has as yet taken no judicial proceedings of any kind against his tenant. Nevertheless, we may see much to make us think that this power of extra-judicial distraint is not very old. Bracton speaks as though it was still usual for a lord to obtain a judgment in his own court before he distrains a tenant into the performance of his service; and we may see that in his day some lords are still taking the course." *Pollard and Maitland History of English Law,* Vol. 1, Par. 11, page 353.

3 "A distress for rent is not a judicial proceeding, for it is returnable to no court in a pending suit, and serves only as authority to the officer to do what the landlord at common law could do for himself." Pat v. Shannon, 69 Miss. 372, 13 So. 729. To the same effect are Smith v. Jones, 65 Miss. 276, 13 So. 740, and Barlow v. Serio, 129 Miss. 432, 91 So. 573. In Pennsylvania distress has been held to be a ministerial and not a judicial act.

It is a common practice when a landlord distrains for rent to include the accounts and receivables among the goods and chattels seized. This may be done under an attachment but should not be confused with the lien sought to be established by distress; and if the landlord relies on his lien, legal or equitable, as given him by the statute, attachment is not the remedy.

premises at the time of taking such goods and chattels in execution, provided the money due shall not amount to more than one year's rent; and if more be due, then the party suing out such execution, paying and tendering to such landlord, or lessor, one year's rent may proceed to execute his judgment."

Rev. Code 531, Article 288. "This Legislation is founded on the idea that the landlord has no common law lien here for rent and hence the necessity of this special protection by Statute of the interest of the landlord to the extent of one year's rent against the general lien of a judgment. We think this provision of the Statute does not affect the tenant's conveyance by Mortgage in good faith and for valuable consideration of the property on the demised premises or where there is a special lien thereon created by contract, prior to the levy of the attachment for rent."

In *Stamps v. Gilman & Company,* Stamps sued out an attachment for rent against the tenant Lilly, and had it levied on ten bales of cotton which were claimed and replevied by Gilman & Company. Lilly had executed a mortgage in April 1866 to Gilman & Company to secure advances. The attachment of the landlord, Stamps, was sued out on the 22nd of October 1866.

"The special priority here referred to is the right to one year's rent, before the goods shall be sold under an execution in favor of a judgment creditor. The landlord's right (however it may be described) is not a jus in rem; it does not amount to a title legal or equitable. He can maintain neither tresspass nor trover in respect to the effects. The provision of the Code forbidding the sale under execution, unless a year's rent be paid, etc., has been relied upon in support of the idea that the landlord has a lien. This article is essentially copied from its British prototype, 8th Anne, and comes to us with the interpretation put upon it by the English Courts. These are some of them:

The landlord must notify the sheriff of his lien prior to a sale under judicial process, and demand his rent, or otherwise it is not the duty of the sheriff to retain the rent. Warring v. Dulany, 1 Strange, 97.[4]

After demand and notice, if the sheriff remove or sell the goods, he is liable only for their value, less his expenses. Dodd v. Saxly, 2 Strange 1024.

A sale under the execution rests the title in the purchaser unencumbered by the landlord's claim. Ex parte Grove 1 *Atk. 104; Coke Litt. 476; Hanchell v. Kimpson, 2 Wilson 141.

This provision of the statute was not designed to furnish a new remedy as against the tenant, but against officers acting

4 In Shalet v. Klauber, infra, (Pennsylvania) the landlord had given notice to the sheriff, before bankruptcy, and thus perfected his lien. While in re Caplan, 23 F. (2d) 680 the Court said: "The requirement of the statute, that some 'action' for the rent should have been instituted, appears to have been met by petitioners claim, proof of which has been duly filed in the bankruptcy proceedings."

execution on judgment against the tenant. A sale under execution at common law passed the title. Nor was there any remedy in favor of the landlord against the judgment creditor, or the sheriff who made the levy and sale, nor, since this statute, can the landlord follow the goods into the hands of the purchaser. His only recourse is to obtain the value of the goods, to the amount of the year's rent, by application to the court to which the execution is returnable, or by an action against the sheriff.

Now all this doctrine negatives the idea that there is a lien on the goods, for the benefit of the landlord. If the sheriff, by his sale, can pass the title (and he can transfer none other or greater, than the tenant had), it would seem to follow that the tenant himself, might make a conventional sale, if actuated by good faith, and for valuable consideration. ***

We are conducted by the foregoing reasoning and authorities to these conclusions.

1st. That by virtue of the relation of landlord and tenant, no lien on the tenant's effects on the demised premises, results, or is implied, at common law, or by the statute.

2nd. That what is popularly supposed to be the landlord's lien, is nothing more or greater than the right, on the conditions and contingencies, enumerated in the statute, to sue out an attachment.

3rd. That the seizure of the effects under the attachment, makes, or creates a 'specific lien.'[5]

4th. That the dominion of the tenant over his effects on the demised premises, is co-extensive with that of any other debtor, both as to use and sale, provided the sale be for valuable consideration, and in good faith.

5th. That a mortgagee is a purchaser, sub modo, and after condition broken, can maintain trover, detinue, or replevin, in respect to the mortgaged effects.

6th. That the mortgage to Gilman & Company having been executed in good faith for value, and the forfeiture having occurred before the levy of the attachment for rent, the mortgagee has a superior and better right to the cotton than the landlord under his attachment.

Urged by the copious arguments of counsel, we have examined the questions presented, somewhat de novo, and are satisfied with

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5 ''An attachment is given as a means to enforce this lien (on agricultural products), as well as to enforce the claim of the landlord against goods of the tenant as to which there is no lien. As to goods and chattels, not agricultural products of the leased premises, the landlord has no lien but only a right of seizure by attachment. As to them a lien is acquired by the levy of attachment, but the attachment is not necessary to create a lien on agricultural products. The statute causes that to spring from the facts of their existence, and the attachment is given as a convenient instrumentality for making the lien available.'' FitzGerald v. Fowlkes, 60 Miss. 270.

the judgment pronounced in Marye v. Dyche et al., at the April term 1869. See 42 Miss. Report 347.''[6]

Pursuing these authorities we find the following statement in Engleberg v. Tonkel, 140 Miss. 513, 106 So. 447:

''It was held in White v. Miazza-Wood Construction Company, 122 Miss. 213, 84 So. 181, construing Sec. 2851 of the Code of 1906 'Section 2349 Hemingway's Code', that a landlord had no lien upon his tenants' goods other than agricultural products; that the statute in question did not give a landlord's lien on the property on the leased premises for the unpaid rent; that the statute gave the landlord a right only to the payment of his rent before the goods on the leased premises could be taken by execution or other legal process; that, therefore, a bona fide purchaser for value of such property took it free from any claim of the landlord.''

In this case the goods on the leased premises had not been seized by execution or other legal process.

The foregoing seems to be decisive that in the absence of distraint, the landlord has no lien in the strict sense of the word.

This is the view taken by the Circuit Court of Appeals of the Fifth Circuit in the case of *Williams v. Noble, Trustee,* 56 Fed. (2) 658. However, there is a slight cloud upon the recent above Circuit Court of Appeals decision cast by the case of *Austin v. O'Reilly,* 2 Woods 67, decided by the U. S. Circuit Court for the Southern District of Mississippi on June 21, 1874 by Mr. Justice Bradley of the U. S. Supreme Court on Circuit.

At the time of adjudication the bankrupts were indebted to Austin in the sum of $1,850.00 for one year's rent. An assignee being appointed, the rent was demanded before he removed the property.

''This case depends on the question whether, in the State of Mississippi a landlord, whose tenant becomes a bankrupt before any attachment has been issued for rent, is entitled to priority of payment over general creditors. This question must be decided in view of the provisions of the bankrupt law and the peculiar rights of landlords, in reference to enforcing payment of rent in Mississippi. *** These provisions show that all liens, except such inchoate ones as arise upon an attachment, are protected by the law. But how do these provisions operate upon the peculiar lien or right of distress; given to a landlord for his rent? That right, at common law, was founded on the principle that the landlord retained his ownership, not only in the land

6 ''This is the necessary result of adherence to Marye v. Dyche and Stamps v. Gilman, decisions which violated the popular, professional, legislative, and judicial understanding of the law in this state prior to their announcement, but which should not now be disturbed, and must be followed to their logical consequences.'' Richardson v. McLaurin, 69 Miss. 70, 12 So. 264.

but in so much of the produce thereof as was reserved by him for its use. Such reserved portion or reditus, was considered as belonging to him by virtue of his original ownership; but not being separated from the rest of the profits, he could only seize a reasonable amount as a distress or security to compel the payment or appropriation of his stipulated portion. When the render consisted of personal service, such service was regarded in lieu of the profits of the land, to which, until the service was rendered, the landlord's qualified property and right of distress extended, as in the case of actual rents. The Legislature afterwards extended the right of distress to other things besides the profits of the lands; and, as far as the right extended, the principals of the latent or qualified property of the landlord in the subject of distress accompanied it. Other legislation enabled him to sell the goods distrained, in order to realize the amount of his rent, if the tenant proved refactory. In some states it is provided that, instead of making the distress himself, the landlord must procure a warrant from a magistrate or court, to be executed by an officer. But this regulation of the mode of exercising the right does not effect the nature of the right itself.

It is common to call the right a lien, and yet it is not strictly such, for it does not attach to any specific article or property. The tenant, if a farmer, may in the due course of business, sell produce or cattle or other things; and if a merchant, he may in the same manner sell merchandise; and the sales if made in good faith, will be valid, and the property sold will be free from the landlord's right of distress, if removed from the demised premises, and, in most states, without such removal. But if the sale be made for the purpose of depriving the landlord of his right, he may, by the English statutes and by the statutes of most of the States, follow the property within a reasonable time after its removal. Now if the landlord's rights were a strict lien, no valid sales could be made at all. Still, being called a lien, and being a peculiar right in the nature of a lien, which is greatly relied on as an essential condition of all leases, and the subversion of which would work great injustice, and would in the end operate prejudicially to both the interests of the tenants and their creditors by inducing landlord to require onerous conditions for their security, the Supreme Court of the U. S. and most of the District and Circuit Courts, have regarded it as fairly to be classed as a lien within the true intent and meaning of the Bankrupt Act, and have allowed the landlord a priority over the general creditors to the extent of the goods subject to his right of distress. This right of the landlord has been regarded as peculiarly entitled to priority when by statute an execution creditor of the tenant is prohibited from removing the goods until he had paid the landlord's rent or a reasonable amount (generally a year's rent) which may be accrued. Thus in Longstretch v. Pennock, 20 Wall. (87 U. S.) 575, the Supreme Court places special emphasis on this fact.

In Mississippi, it is true, the landlord is obliged to sue out

an attachment for the purpose of affecting a distress for rent; but when the attachment is sued out, his rights are the same in effect as those of the landlord at common law. That they are founded on and grow out of these rights is evident from the fact that he is not compelled to pursue his claim to a judgment like other creditors. The attachment in his case is in the nature of an execution; or more properly speaking, of a distress. He has the same priority of right over execution creditors, and the same right to prevent the removal of goods and to follow goods clandestinely removed, which exists in England and most of the other states. It is true that the Supreme Court of this State has held that the landlord's right is not a lien; and that a bona fide mortgage or sale by the tenant will displace it. I do not think, however, that these decisions are sufficient to deprive the landlord in bankruptcy proceeding of his just right of priority over general creditors. They gave credit with the understanding that the landlord's rights were superior to theirs. He therefore has no equity to be preferred. With regard to them he stands in precisely the same position and invested with the same rights as if his common law right of distress remained. A decree will be made, declaring the right of the landlord to be preferred before general creditors upon the proceeds of all goods subject to his right of attachment at the time the proceeding in bankruptcy commenced.''[7]

If distraint is exercised prior to execution or other process, the situation is simplified because unquestionably the lien attaches in Mississippi. The inquiry is directed to

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7 Austin v. O'Reilly, District Court Southern District of Mississippi (1873), Case No. 664. This was the petition by Austin against O'Reilly, assignee of Steele & Company to have paid him as a preference, a claim alleged to be due for rent of a plantation leased by Austin to Steele & Company. The petition was refused. Hill, District Judge: The assignee in bankruptcy took personal property on the plantation and sold same and the contest for the rent for 1871 is over the proceeds. The landlord claims he had a lien for the rent; and that the assignee stands in the place of the sheriff with an execution to be levied on the personal property on the premises, who, under the statute, is prohibited from removing the property upon the leased premises until he shall have paid to the landlord his claim for rent for one year, if so much remains due, and that the assignee having sold the property, he is required first to satisfy the rent out of the proceeds.

''Our statute was carefully considered by me in the case of Cleary v. Martz in this Court and again in Burtin v. Came in the Northern District, some years since, and then decided that no lien is created by the statute; that only a summary proceeding is given to the landlord for the collection of his rent; that the seizure of the property creates a lien and until that is done the title to the property is entirely unaffected by the claim for rent; that the tenant has a complete right to dispose of it as though no rent was due. Since that time this ruling has been sustained by the Supreme Court of this State, first in Marye v. Dyche, 42 Miss. 347, and Mason v. O'Brien, Id 420 and still more recently in Stamps v. Gilman, 43 Miss. 456.''

''The assignee took the property in the same condition for the benefit of the general creditors only subject to the lien then existing upon it by contract or operation of law. ***''

whether the lien, or right or veto power given under Section 2175 is sufficient in the absence of such prior levy.

In discussing the nature of this right, Chief Justice Chase said while on the Circuit in the case of *re Wynne,* 227 Fed. Case No. 18117:

"The real question is, were the goods on the premises demised to the Bankrupt subject to a lien for rent under the state law when the petition was filed, independently of any proceeding by distress or attachment? Liens are various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt."[8]

It would seem from the foregoing that though the word lien is not expressly used in the statute, a right equal to a lien, or even more efficacious, has in substance been granted to the landlord and that the simple thing to do would be to brush aside technical verbiage or phraseology and seek the substance of what the law intends to protect.[9]

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8 If the origin of the Mississippi and Virginia statutes are the same, namely 8 Anne, we have Chief Justice Chase of the Supreme Court, while on Circuit, upholding the lien theory in re Wynne, 227 Fed. Cas. No. 18,117, and Justice Bradley of the same court, in Austin v. O'Reilly deciding that the landlord has a lien in Mississippi, which would indicate the prevailing thought of that period.

9 An illustration of the diversity which exists throughout the several States regarding the status of the landlord may be found in the cases of re City Drug Store, 224 Fed. 132, where the Southern District Court of Georgia held that notwithstanding the amendment of 1910 and in the absence of actual distress proceedings, the landlord is entitled to priority; and in the Northern District of Georgia in the case of re Grovenstein v. Bishop Co., 223 Fed. 878, where the Court said "there is a lien existing all along without reference to the issuance of levy of distress warrant in favor of the landlord which must be superior to general creditors; but it is not superior to judgments obtained against the property of the bankrupt and that is what the trustee has under this amendment of June 1910."

The present trend of the Pennsylvania decisions, as reflected by re Philbin, 53 F. (2d) 218, appears to be against giving the landlord a lien until notice or distraint has been made, although the case of re Duble, 117 Fed. 794, holds that the statutory priority was preserved to the landlord, "being within the equity of the statute," but his right to levy distress and enforce his lien, if he had it, had been lost after the goods had become in custodia legis. The more recent case of re Pittsburgh Drug Company (164 Fed. 482) holds that the landlord is entitled to priority, whether he had sued out distress or not, stating "The landlord has the right of distress. The goods were subject to distress. If the goods were on the premises and liable to distress the landlord would be entitled to his claim though the goods had not been taken by warrant or distress." Prior to that the Court had said in re West Side Paper Company (162 Fed. 110): "It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant." And in Uber v. Rosenbloom (256 Fed. 590) occurs the following: "When bankruptcy appropriates the landlord's security and cuts off his legal remedies under the

In *Bradford v. Graham,* 287 Fed. 686, the Circuit Court of Appeals, in passing on the Virginia Statute,[10] decided that the landlord was entitled to priority. The Bankrupt was adjudicated on February 27, 1922. No distress warrant or other method of distraint had been taken out. The rent had been paid up to January 31, 1922 and the landlord claimed rent up to January 31, 1923.[11]

Conceding for the sake of argument that no lien (or any right equal thereto) is given to the landlord in the absence of distress, the question arises as to the effect of a failure on the part of the landlord to sue out such a writ through no fault of his own; in other words, if by some intervening agency or machinery of law, he is prevented from taking this course which would absolutely perfect his lien. In Mississippi there are two cases dealing with this situation

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exigencies of the debtors insolvency, it would be most inequitable, speaking generally, to deprive a security holder of his security and hand it over to his general creditors.'' Lastly, in re Abruzzo, 276 Fed. 404, it is said: ''While there is no specific lien except on the goods actually distrained, all the goods on the premises are treated as a quasi pledge which gives superiority to the specific lien established by distraint.''

10 If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage or otherwise upon the interest or property in goods on premises leased or rented, of any such person liable for the rent, the party having such lien may remove said goods from the premises on the following terms, and not otherwise, that is to say: on the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being altogether more than a year's rent in any case. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines.'' Section 5524 Code 1919 (Section 2792 Code of 1887). The Pennsylvania Statute of 1836 is ''almost precisely like the Virginia Statute,'' says the Court in Bradford v. Graham.

11 The rights conferred under Sec. 64b (7) and under Sec. 67d are not the same. Under the former, ''debts owing to any person who by the laws of the States or the United States is entitled to priority'' are preferred; and under the later section ''liens'' are not effected by bankruptcy. Rent is certainly a ''debt'' and the least that can be said of it is that under the laws of Mississippi it is entitled to some kind of priority. It is strongly urged, as indicated, that rent is not only a ''debt'' but a ''lien'' and should not have to be placed 7th and last in the schedule of distribution even though that arrangement places it ahead of general creditors. In Shalet v. Klauber the landlord based his contention on Sec. 67d, while the other side said it was controlled by 64b (7). In Bradford v. Graham the opinion only referred to 64b (7). Neither does re Pittsburgh Drug Company, 164 Fed. 482, refer to any other section except 64b (7). The logic of this would seem to be that where the absolute lien has not been established and perfected, say by positive provision of the statute or by distraint, whereby it could be definitely classified under 67d, it is still sufficiently established as a right in the nature of a lien to qualify under 64b (7).

to-wit: *Rice v. Harris,* 76 Miss. 422, 24 So. 880; *Epstein v. Farr,* 112 Miss. 530, 73 So. 572. In the first named case the owner of a stock of goods made an assignment for the payment of her creditors. The stock was sold under order of the Chancery Court and removed by the purchaser and the landlord propounded his claim for rent due. The Court held that to attempt to distrain the property after the assignment would be a contempt of Court, and but for the assignment the landlord would have had the right to distrain the goods for the collection of his rent.

In *Epstein v. Farr,* the goods were taken charge of by the administratrix and the estate was being administered by the Chancery Court. The landlord propounded his claim for rents and the stock of goods were sold. It was held that the landlord was entitled to his full rent as a priority claim and that the administratrix be required to pay the same in full. And that here the landlord was prevented from distraining by such proceedings as assignment or administration, and his lien was projected over on to the proceeds of the personal property upon which he would have otherwise been entitled to distraint. In *Lontos v. Coppard,* 246 Fed. decided by the Fifth Circuit Court of Appeals, among other things the Court said:

"On the other hand it may be considered settled, in this Circuit at least, where the state law does give the landlord a lien for the unexpired term of the lease or any part of it, the claim for rent for that period may be proved in bankruptcy and enforced against the personal property subject to the lien, even though the debt may not be proved against the general estate," and further "the rights of all parties were fixed at the moment of adjudication in bankruptcy, at which time the bankrupt was occupying the leased premises and the goods and chattels contained therein were impressed with the landlord's lien. The property passed to the Trustee, burdened with a valid lien. *** The Trustee represented the landlord as well as the other creditors and his occupying of the leased premises and possession of the property contained therein could not be construed as adverse to the landlord for the purpose of defeating his lien. After the adjudication in bankruptcy there was nothing the landlord could do to enforce his lien but file his claim in bankruptcy proceedings." Concluding it was said: "As the landlord was entitled to payment in full out of the proceeds of the personal property in the lease premises, it follows that the judgment appealed from must be reserved, etc."[12]

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12 "The lessor's right against the proceeds of sale is the same as it was against the property sold. First National Bank v. Title & Trust Company, 198 U. S. at page 291, 25 Sup. Ct. 693, 49 L. Ed. 1051; 2 Loveland Bankr., page 1096, note 58. The tenants were forced into bankruptcy; but as to the year's

Paine v. Sykes, 72 Miss. 351, was a case where a druggist made a general assignment of his stock of goods for the benefit of his creditors and an assignee was appointed by the Chancery Court. While the goods were on the premises, the landlord sued out an attachment, it was said:

"The assignee in the deed of assignment made by Whittney was not a bona fide purchaser for value, and the property in his hands was subject to the distress warrant sued out by the landlord. Paine v. Hotel Company, 60 Miss. 360. The statutory proceeding by which the assignee was converted into a receiver, had no other effect upon the right of the landlord than to preclude her from making an actual levy of the writ upon the property in the hands of the receiver and necessitating an application to the Court for recognition and enforcement of her right to go against the property or to have satisfaction out of the proceeds."

In the case of *Bennett v. Sproul,* 42 Fed. (2) 33, the Pennsylvania statute, which is similar to that of Mississippi, was quoted as follows:

"The goods and chattels being in or upon *** lands *** which *** are *** demised for *** years *** and liable to the distress of the landlord shall be liable for the payment of any sums of money due for rent at the time of the taking such goods in execution; provided that such rent shall not exceed one year's rent. It will be observed," continued the opinion, "that this Court has held that bankruptcy was a taking in execution within the statute." Under the amendment to the Bankruptcy Act of 1910 the Trustee is invested with "all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

A late pronouncement on the extent of the Trustee's title is found in *re Allee,* 55 F. (2d) 76.

"The source of Trustee's title, if any, is based upon 11 U. S. C. 75 (a) (2), 11 U. S. C. A. 75 (a) (2), which in part reads as follows: '*** such trustees, as to all property in the custody *** of the Bankruptcy Court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied. ***'

"By virtue of this statute, courts have referred to a trustee in bankruptcy as the 'perfect creditor'; but this does not mean that his powers and rights and title exceed those of any other judgment creditor who holds an execution duly returned unsatisfied, or that they supersede a prior valid lien. This court has held that such trustee is not to be considered as a purchaser for value,

rent this property stood in their stead; and the trustee in bankruptcy received the property in this plight." Courtney v. Fidelity Trust Company, infra.

but that his powers, rights, and title are the same as any other judgment creditor who holds a returned and satisfied execution, and that he cannot, in any case, take property not belonging to bankrupt. In re Abell (C. C. A.) 19 F. (2d) 965; In re Steiners Improved Dye Works, Inc. (C. C. A.) 44 F. (2d) 557."

It would seem difficult, if bankruptcy is a taking in execution, to say that the landlord is to be denied his right to payment of rent when he cannot help himself because bankruptcy has intervened and invested the Trustee with certain rights and powers. As was said in the case of *Lontos against Coppard,* the Trustee represented the landlord as well as the other creditors and did not hold adverse to the landlord for the purpose of defeating his lien, or as is contended here, for the purpose of preventing him from projecting his lien on to the proceeds.

Of course, if the landlord's right or lien is not sufficient, before distress, it cannot be strengthened by any action taken after bankruptcy by an attempted levy. *Watkins v. Alexander & Garnett* (C. C. A. 5th), 283 Fed. 968; *Shalet v. Klauber,* 34 F. (2) 594. Under the authority of *Mayer v. Henderson,* 225 U. S. 631, 56 L. Ed. 1233,[13] when the so-called right of the landlord is inchoate or dormant and not a specific lien on the property, nothing that the landlord can do after a petition in bankruptcy has been filed will enlarge or perfect his rights.

In *re Delaney,* 251 F. 425 (Penna.) it was said:

"The question involved in this petition for review may be stated in any one of several ways. In its practical form it is whether a landlord, who had, at the time the petition in bankruptcy was filed, a right, or the lawful power, to distrain upon goods and chattels upon premises demised to the alleged bankrupt, is entitled to priority of payment of the rent in arrear (up to the limit of one year's rent) out of the proceeds of the sale of such goods and chattels by virtue of the provisions of the Pennsylvania statute and Sec. 64, Clause 'b', Subdivision 5 of the Bankruptcy Act. Inasmuch as a lien, as distinguished from the power to acquire a lien by and through a levy, is given 'by the laws of the state' (so far as affects the instant case) in cases of executions, the real question is whether a proceeding in bankruptcy is in legal intendment and effect an execution, or, as the accepted phrase is, whether it is an 'equitable execution.' *** The Hoover case is in itself decisive of the question, because it

13 Justice Lamar said in that case, commenting on Austin v. O'Reilly (decided in 1874): "There is nothing in the Act of 1898 opposed to this conclusion." This case is also authority for the proposition that distress for rent is not a "legal proceeding" within the meaning of Sec. 67 F. declaring void all judgments, levies and liens acquired within four months of bankruptcy; and thus enables the attaching landlord to claim in excess of one year's rent.

is authority for the proposition that a bankruptcy proceeding is in its essence, although not in form, an execution, and, if an execution, the state's laws give the landlord a claim upon the proceeds of the sale in lieu of the lien which he might have acquired by distraint, had the execution not intervened. The wisdom of the policy of the law in allowing this substitution invites us to construe the act in liberal spirit. It is true that the Hoover case under its facts presented the feature of a lien acquired by an actual levy under a warrant of distraint; but it is to be observed that the ruling is not put upon this ground but upon the effect of the Pennsylvania statute, which gave a lien in cases of executions, and the finding that the bankruptcy proceeding was execution process within the meaning of that statute. As the statute allows the landlord his rent claim because of his right to have levied, whether he had distrained or not, the fact of actual distraint becomes unimportant."

RENTS, ACCRUED AND TO ACCRUE

Claims of the landlord for rent may be two fold namely: Rent that has accrued at the date of bankruptcy, and rent to accrue.[14] The question of allowing rent which has accrued at the date of bankruptcy on the basis of it being a lien protected under 67d and allowed as a priority under Federal or State laws in accordance with Section 64b (7) has been discussed.[15] A further question arises as to rents to accrue under the specific lease contract. The wording of the particular contract is important. Some leases use the phrase that the instrument shall be voided upon bank-

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14 "The officer making the levy is liable, if he removes the goods without paying or tendering the landlord the rent," meaning all rent contracted to be paid by the tenant, not exceeding, however, one year's rent. Shanks v. Greenville, 57 Miss. 168.

15 The landlord has a lien on agricultural products regardless of whether he sues out an attachment; he is compelled to attach on other goods and chattels. And under the theory that this would give him a lien on such goods and chattels for all the rent due, even exceeding that of one year, he would acquire a greater right than he is given under the naked landlord lien statute because some of these goods and chattels might have come into possession of the tenant many years before he moved on the demised premises, and some of them might have been acquired by purchase, or gift subsequent to the term. It is conceivable that due to drouth or insects a total failure of crops might result, and upon attachment, the rent could be made out of these goods and chattels acquired prior and subsequent to the lease in the absence of any agricultural products upon which to distrain. It has been asserted that, while Section 2175 raises the claim of the landlord to the dignity of an equitable lien to the extent of a year's rent, as against general creditors, under the authority of Fitz-Gerald v. Fowlkes, note 4-A supra, the landlord, having no lien but merely a right of seizure by attachment, upon bankruptcy by virtue of Section 67f of the Act whereby all levies, judgments, attachments or other liens obtained through legal proceedings with four months of adjudication shall be deemed null and void, the claim of the landlord would be swept aside. But see note 13 supra.

ruptcy.[16] Some go further and state that upon bankruptcy the rent to accrue shall become due and payable. While others contain a provision that upon bankruptcy the rent to accrue, at the option of the landlord, is to be considered as liquidated damages. Some Courts hold that rents to accrue are not provable claims[17] which can be filed in bankruptcy and are not allowed. Others take the view that the amount claimed or the damages, are not sufficiently fixed but are remote and contingent and therefore not provable, or have no reasonable relation to probable damages which may follow a breach.[18]

Section 63a (4) provides that "Debts of the bankrupt may be proved and allowed against his estate which are *** founded upon an open account or upon a contract expressed or implied. ***"

In the case of *re Ideal Company* (3rd Cir. 1930), 39 F. (2) 18, the Court held that where the character of the contract, upon which the claim for excellerated rent rests, is such that the liability of the tenant was fixed and absolute at the time the petition was filed, it is provable because the contingency upon which the amount depended had occurred, and the claim liquidated in time to admit proof.

The Trustees in Bankruptcy can take over the lease or disclaim same. In ordinary times if the Trustee disclaims the lease the landlord usually can re-let the premises, and of course, in any event, he should not have a claim for anything over and above the difference between his present rent and that called for by the original lease. The Trustee should promptly disclaim a burdensome lease but if a landlord claimed accrued rent and the decisions of that Circuit upheld such claim, it would obviously be the duty of the Trustee to take over the lease and try to re-let the premises to offset this rent claim.[19]

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16 If the lease expressly says that upon bankruptcy or default in rent, upon notice, it shall expire and terminate, then the lease is no longer in existence. Re Rite's Clothes, Inc., D. C. 1931, 49 F. (2) 393. Baum & Rubin, 27 F. (2) 191 (5th Cir. 1928).

17 Duval Men's Shop, (Referee's decision) 17 A. B. R. (N. S.) 348. This case cited Roth & Appel. (C. C. A. 2d Cir.) 181 Fed. 667, Re 20th Century Millinery Exchange (D. C. 1930), 41 F. (2) 237. Re Mullings Clothing Store (C. C. A. 2nd Cir.), 238 F. 58.

18 Kothe, Trustee v. Taylor Trust, 280 U. S. 224, 74 L. Ed. 382.

19 "It is said this result will require the general creditors, in effect to pay the year's rent; but this overlooks the rightful priority of the lien. Moreover, prompt measures might have been taken to re-let the leased premises; a landlord could not both claim the year's rent and prevent the trustee from letting the premises according to the covenants of the lease, for the highest obtainable sum." Courtney v. Fidelity Trust Company, 219 F. 57 (6th Cir.). In that case it is also said that the rate of rent would be fixed by reference

In *Schneider v. Springmann,* 25 F. (2d) 255 (6th Cir.) the claim was for nine months of the unexpired term. The Court said "The decision turns upon the precise language of the lease;" and held that the lessor, under the stipulations of the lease, had the sole option to void the lease, even though another clause stated that in the event of bankruptcy the lease should be "immediately forfeited." The foregoing case cited *Wells v. Twenty-First Street Realty Company,* 12 F. (2nd) 237 (6th Cir.) which was a case in which the lease had several years more to run after the petition in bankruptcy was filed. The Trustee elected not to assume the lease and the lessor filed a claim as a general creditor for damages for anticipatory breach of the covenant to pay rent. And it was said "the law seems to be pretty well settled that in states where the common law obtains,[20] a claim for damages for an anticipatory breach of a lease for real estate is not provable in bankruptcy."

There are at least four cases in the Fifth Circuit Court of Appeals dealing with this question.[21] *Re Katz,* 6 F. (2d) 581 (Dist. Miss.) held that rent to accrue was not provable. This was followed by *Grand Leader Inc.,* 50 F. (2) 264, in which the bankrupt was adjudicated on December 31, 1929 and the Trustee disclaimed the lease. The landlord filed for rent to accrue up to December 31, 1930, claiming a lien under the Texas statute. The Court denied the claim for rent to accrue on the ground of "the equitable execution of bankruptcy in sequestering the goods and property of the bankrupt in 1929 for the benefit of the general creditors, before the 1930 year had commenced. That bankruptcy so operated is settled by the authorities. *** To give effect to the landlord's contention would be to displace the lien of general creditors already matured in favor of an after accruing lien."

Trust Company of Georgia v. Whitehall Holding Company, 53 Fed. (2) 635 is authority for this statement: "It may be conceded that rent accruing after the adjudication,

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to the lease, while recovery would be limited to the loss of rent, in fact, sustained within the year, in passing on the landlord's claim under a lien given by the Statutes of Kentucky.

20 "And on the organization of the Territorial Government in the same year (1795) of the Spanish Treaty, the common law was declared in the Territorial Constitution to be the law of the land." Bench & Bar of Mississippi by Lynch. See also 36 Yale L. J. 418.

21 Martin v. Orgain, 174 F. 772, 98 C. C. A. 246; re Meyer and Bleuler, 195 F. 653; Denechaud v. Tulane Ed. Fund, 200 F. 1022; re Gallacher Coal Co., 205 F. 187; re Varley & Bauman Clothing Co., 188 F. 761; re Cruggs, 205 F. 673; re S. O. Hdwe. & Supply Co., 210 F. 381; Dove v. Davis, 25 F. (2d) 967 (C. C. A. 5th, 1928).

in the absence of a lien, is not a debt provable in bankruptcy."

And *Williams v. Noble, Trustee,* 55 Fed. (2d) 658 in disallowing a claim for rent that had not accrued holds that "the landlord, not having been given a lien by the State law, has none. ***" Which brings us to the latest case of *re Wall,* 60 F. (2d) __ decided by the District Court of the Southern District of Mississippi. The question at issue was an appeal from a Referee's ruling denying the landlord's claim for rent that had accrued. Said Judge Holmes:

"Because in Mississippi the landlord has no statutory or common law lien upon personal property of the tenant in advance of seizure for the rent, accrued or to accrue, and because in Williams v. Noble, as in re Katz, he either had no equity or failed to urge any upon the Court, which entitled him to payment of rent to accrue in the future, the holding of the Referee would deny the landlord priority of payment for rent accrued at the time of bankruptcy. *** It is for this reason that accrued rent, when protected by a statute, such as Sec. 2175 of Miss. Code 1930, is the foundation of a valid claim in equity even though no legal lien is given the landlord before distraint. It is because of the absence not only of a legal but an equitable lien, in claims based on rents to accrue, that the landlord is denied priority in cases like Williams v. Noble and re Katz. In such class of cases it is not necessary to raise an equitable lien to prevent an injustice. Complete justice is ordinarily done when the landlord is granted priority for accrued rent and the demised premises are released to him for the unexpired portion of the term."[22]

TAXES VERSUS WAGES AND RENT[23]

MISSISSIPPI CODE, SECTION 3120—"TAXES, a lien, from what date—Taxes, both state and county, upon lands or personal property shall bind the same, and be entitled to preference over all judgments, executions, encumbrances, or liens whensoever created; and all taxes assessed shall be a lien upon and bind the property assessed, from the first day of January of the year in which the assessment shall be made; and no property shall be exempt from distress and sale for taxes."

Taxes are indisputably a lien in Mississippi,[24] and one might choose between the authority, reasoning and logic of *re Tresslar,* 20 Fed. (2d) 663, and *re Brannon,* 53 Fed. (2d)

22 Longstreth v. Pennock, 87 U. S. 575, 22 L. Ed. 451, holding that the landlord's claim was "within the equity of the statute."

23 As to costs, see Little v. Payton, 54 F. (2) 678 (C. C. A. 5th, 1931).

24 Taxes are a lien on the property in existence at time of assessment, but not on subsequently acquired property. The burden, therefore, should be on the tax collector to show just what part of the property taken over by the Trustee in Bankruptcy was on hand at the time of the assessment and he must identify it as subject to assessment. Tampa v. Commercial Bldg. Co., 54 F. (2) 1057 (5th Cir.).

401. The latter case plants itself squarely upon the ground that paragraph 67 (d) does not mean involuntary liens, such as taxes and landlord's liens which arise by creation of law, but to those voluntary liens such as mortgages and the like. The opinion stated that Congress was paramount and could direct which class was to be given precedence; and that paragraph 64 was not a mere classification but a positive direction.[25]

The manner of approach made to the question in this decision greatly simplifies the matter because if we follow it there only remains to ascertain if the liens are given voluntarily to enable one to fix the order of payment. But many courts, in fact most of them, have seen fit to use paragraph 67 (d) in vitalizing and preserving other types of liens. When one pursues the latter course it becomes necessary to inquire more deeply into the nature or right of the lien, in the light of the decisions in each particular State under consideration.

The case of *re Tresslar* holds that taxes come before wages, despite the 1926 amendment to the Bankruptcy Act advancing wages in the order of priority. The Court therein construing the Alabama statute giving a lien for taxes (similar to the Mississippi statute) held it to be a lien which Congress did not intend to destroy. Both of these District Courts are in the Fifth Circuit Court of Appeals.

The Amendment of 1926 was so revolutionary and drastic that many courts lost sight of the reasoning of prior decisions and thought that it was clearly the intent of Congress to prefer wages to every other claim; and this, in face of the fact that the amendment favored the wage-earner to the extent of not only doubling his allowance but placed the claim in a more advantageous position generally. Manifestly Congress sought to give wages additional advantages, but it is extremely doubtful "that Congress thought it more important that the wage-earner receive pay than that either the Nation, or the State or the City receive its taxes."

25 Oliver, Trustee v. U. S. of A., 268 U. S. 1, 69 L. Ed. 817. The contest here was between wages and taxes. This case cites Guarantee Title & Trust Company v. Title Guarantee Company, 224 U. S. 152, 56 L. Ed. 706. "Guarantee Title & Trust Company v. Title Guarantee Company, supra, declares that the taxes of paragraph 'a' are civil obligations, not personal conventions, and preference was given to them over wages specified by clause (4) paragraph 'b'. We adhere to this as a correct statement of the general rule to be followed whenever it does not clearly appear that the particular tax has been subordinated to claims for wages by some relevant law."

In the same opinion it was previously said: "We do not undertake to decide in what order, as among themselves, taxes and the debts specified by paragraph 64 should be satisfied: that point was not presented."

Surely Congress did not want to go that far, and while it manifested a generosity not easily explainable by logic in raising the amount of wages earned within three months of bankruptcy from $300.00 to $600.00 at the expense of general creditors, there is nothing to indicate that it intended to penalize the National, State and Municipal governments by denying them the liens fixed by their respective laws.[26]

The case of *re Cardwell,* 52 Fed. (2) 158, decided by the Fifth C. C. A., was a contest between the landlord, whose claim to a lien was upheld under the Texas Revised Statute, Article 5238, and the City Tax Collector and an independent school taxing district:

"As I gather from the contention of the taxing authorities in their brief, reliance is placed upon Section 64a (11 U. S. C. A. 104 (a)), directing the court to order the trustees to pay all taxes legally due, and Section 64b (11 U. S. C. A. 104 (b)) listing as debts having priority, 'in advance of the payment of dividends to creditors *** taxes payable under paragraph (a).'

"The view that this section controls seems to have prevailed with the referee. I do not agree with this conclusion. While the section invoked does classify debts in the order of their priority, it cannot, through classification, defeat a valid lien such as that of the landlord, which is not affected by the bankruptcy. Fudickar v. Glenn (C. C. A.) 237 F. 808; Lontos v. Coppard (C. C. A.) 246 F. 803. Such statutory liens as are in existence prior to bankruptcy, and not solely dependent upon a levy of any character for their inception, are not priorities to be ranked in order of payment by this section, but are valid and enforcable liens and are protected under Section 67d of the Bankruptcy Act (11 U. S. C. A. 107 (d)). Section 64 (11 U. S. C. A. 104), known as the priority section of Bankruptcy Act, relates exclusively to the subject of the rights of priority of payment arising among those

26 "A different order is prescribed by the Act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the U. S., State, County, District or Municipality.' These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say it was inadvertence. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt—National, City and individual—and assigns the order of payment. The policy which dictated it was beneficient and might well induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depended upon their daily labor. And to give such claims priority could in no way seriously effect the sovereign. To deny them priority would in all cases seriously effect the claimants." Guarantee Title & Trust Company v. Title Guarantee Company, supra.

An interesting question might arise if the tax collector and the exemptionist (tenant) appeared at the time the landlord distrained, and the property on the premises was insufficient to satisfy all claims, although it seems that only the property mentioned under Sec. 1755 (Code 1930) and not that of Sec. 1766, is exempt from taxation and distraint, at least, where the exemptionist owns both types of property.

whose claims would, in the absence of such section, stand on terms of equality before the law as general unsecured creditors. Such section has no reference whatever to the subject of liens, and claims entitled to priority of payment by this section do not outrank claims secured by valid liens. Section 64 has no reference to lien debts. City of Richmond v. Bird, 249 U. S. 174, 39 S. Ct. 186, 63 L. Ed. 543; Lott v. Salsbury (C. C. A.) 237 F. 191; in re Yoke Vitrified Brick Co. (D. C.), 180 F. 235; Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 35 S. Ct. 377, 59 L. Ed. 583; Collier p. 1438."

This last case settles the controversy raised by the decisions of the two District Courts. Under the Texas statutes it is therefore settled that rent comes before taxes, and in Mississippi, as stated, it is equally clear that taxes come ahead of everything else. Both rights are claimed or sustained on the theory that they are valid liens given by the particular State law and are protected by paragraph 67d of the Bankruptcy Act which reads as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall to the extent of such present consideration only, not be effected by this Act."

In Mississippi there is no statute giving a wage-earner a lien and the question of policy should not enter into the discussion, that is, whether the particular state favors a landlord claim for rent, or a tax claim, because that would be matched by the well known sentiment of Congress favoring the wage-earner, and Congress would have the last word. If it be treated as a matter of expediency alone, it might also seem that it would be better to let the wage-earner suffer than that the business be wrecked, thereby throwing many out of employment and sustaining other losses incident to a business failure, which must necessarily follow if the landlord is compelled to distrain for rent every time the firm becomes in arrears. The moment that the landlord attaches the store will close, and if the landlord's interest is not protected he will be hasty to secure those safeguards which the law says he must take in order to get his rent.

CONCLUSIONS

From the foregoing discussion it is submitted that:

1. Taxes are a first lien under the law of Mississippi and entitled to priority of payment before anything else, including those exemptions, set out under Sec. 1766 of the 1930 Code, if the exemptionist claims under Section 1755.

2. In view of the fact, that at common law the landlord had no lien in the strict sense of the word but only the bare right to seize the property as a pledge or security without the actual power to subject it to the debt due; and, under the Statutes of Mississippi the word "lien" is not used; and further, under the decisions of our Supreme Court it has been decided the landlord has no lien, it is submitted that the proper solution is reached in the case of *re Wall, supra,* namely, that an equitable lien is raised which accomplishes the same purpose. It rates a trifle lower than a strict lien, because equity must be done, and its object being to establish justice, it cannot subject property to the exclusion of the rights of every one else. All things being equal it will be upheld and enforced as if distraint had been actually exercised. The landlord, not having an absolute legal lien, but coming "within the equity of the statutes" cannot plant himself upon 67d of the Bankruptcy Act. That paragraph has already been given an interpretation more broad than was perhaps intended by its framers, so as to embrace involuntary liens which arise by operation of law as well as those voluntary liens which arise by intent of the parties. Therefore, it would seem that his only protection, in the absence of prior distraint, would lie under 64b (7) and certainly Congress did not mean to relegate wages to that remote and subordinate position. The logic that gives taxes, where a direct and specific lien by statute, priority over everything else except administration costs, is lacking under the conception that the lien of the landlord before distraint is only "equitable." This seems to be the plausible solution despite the statement in *re Bennett,* 153 Fed. 673 to the effect that "It is impossible to draw any very solid distinction between the equitable consequences of such a right and those of a full technical lien." Distraint prior[27] to bankruptcy creates a specific lien, uneffected by subsequent bankruptcy, enabling the landlord to collect all his rent without time limit.

3. Wages being given a superior position under the 1926 Amendment to the Bankruptcy Act, are preferred over debts resting merely on an equitable basis.

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27 But see Mason v. O'Brien, 42 Miss. 420.

POWERS AND FUNCTIONS OF MUNICIPAL CORPORATIONS

By Kenneth P. Vinsel*

The exercise of powers and functions is necessary to the existence of a municipal corporation. The term function is used to mean the proper activity or duty of the municipal corporation and power is the legal faculty or authority to act. The two are closely related and they are usually considered together; they represent and embody the life of the municipal corporation as a social and political organism. They mark and define the relation of the municipal corporation to the state and other governmental instrumentalities as well as to natural persons. Municipal corporations are designed ultimately for no other end but the welfare of the public, and especially the communities where they are established, and their functions must be organized to this end. It must be understood that they are not created to the exclusive advantage of the incorporators but for the public at large.

The general rule regarding the extent of the powers of municipal corporations is given by Dillon as follows: "A municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable."[1] This rule is held in Mississippi and has been so expressed by the courts.[2]

The municipal corporation is the creature of the state, deriving its powers from the constitution of the state and from the statutes enacted by the legislature. Although the legislature cannot delegate the power to make laws, the grant to prescribe local regulations for local purposes with-

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1 Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 1, Sec. 237; also see McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Secs. 777-819.

2 Hazelhurst v. Mayes, 96 Miss. 656; Wise v. Yazoo City, 96 Miss. 507; Steitenroth v. Jackson, 99 Miss. 354.

in municipal corporation limits is not held to be a delegation of the law making power.

A municipal corporation has a dual capacity as a body corporate and politic and in these capacities it exercises two kinds of powers, private and public. In respect to liability this distinction is important and the courts are often called upon to classify certain functions as private or public. The terms corporate or proprietary are often used in place of private, and governmental rather than public. In 1911, the Supreme Court of Mississippi attempted to give a general rule of distinction. The court began by saying, "It is a matter of no little difficulty to define what are and what are not purely governmental duties of a city. To a very large extent these questions can only be settled by the facts of each particular case, so variant are the conditions under which this question arises." It then proceeded to make a general distinction. "The public or governmental duties of a city are those given by the state to the city as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public, living both in and out of the corporate limits. All else is private or corporate duty."[3] This attempt at a distinction must be considered only as a general one and as the court states, each particular case must be considered in the light of its own facts. Some functions and powers are clearly private, as that of operating street railways, others are purely governmental, as the power of eminent domain.[4]

Further classifications of powers might be made, such as, executive, legislative, judicial or quasi-judicial; mandatory and directory; discretionary and ministerial; also expressed and implied. Power to do an act is often conferred upon the municipal corporation without prescribing a definite mode of exercising the power. In such cases, the corporation has a discretion as to the mode. When the municipality acts in accordance with a prescribed mode of exercise it carries out ministerial functions.

The question of implied powers has been of much importance in respect to the subject of the powers of municipal corporations. Since municipal corporations are creatures of the state, they possess only such powers as the state confers upon them. Municipal corporations exercise limited delegated authority. Since they act under limited powers they must find their authority clearly given in the law and

3 Pass Christian v. Fernandez, 100 Miss. 76.
4 Brown v. Beaty, 34 Miss. 227.

when found they must follow the law. The extent of implied powers is given by McQuillin in his summary of implied powers as follows: "Implied or incidental powers—(1) necessarily arising from those expressly granted, or (2) those essential to give effect to powers expressly granted, or (3) those recognized as pertaining or indispensable to local civil government, to enable it or fulfill the objects and purposes of its creation."[5]

The construction of the powers of the municipal corporation are strictly construed. Any ambiguity or any reasonable doubt as to the power, whether expressed or implied, is resolved against the grant. In construction by the courts it is usually kept in mind that municipal power should be construed with reference to the objects of the creation of municipal corporations, as agencies of the state in community government.[6]

The existence of the power or authority of a municipality cannot be assumed but the municipal corporation claiming a right or power as against the public must be prepared to prove its authority.[7]

EXERCISE OF POWERS GENERALLY

Powers of municipal corporations must be exercised by the official or the body on whom it has been conferred and in the manner provided by the statute or constitution. It is a general rule that a municipal corporation may not delegate its governmental powers or its mandatory powers and functions and even surrender of discretionary powers may be held invalid. Powers are ofttimes given with certain prerequisite conditions, such as a petition or notice, to be fulfilled before the power can be exercised. Except in emergency, these conditions precedent must be fulfilled previous to any legal exercise of the power.[8]

Municipal corporations must be able to assert and maintain their corporate authority against the limitations upon their powers, whether limited by the constitution, statute or by the charter. Powers are limited. For example, the police power must not be in restraint of trade, must be reasonable, have proper objects and other such limitations

5 Hazelhurst v. Mayes, 96 Miss. 656; Clinton v. Turner, 95 Miss. 594; Leonard v. Canton, 35 Miss. 189; McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Secs. 794-819.

6 Crittenden v. Booneville, 92 Miss. 277; Leonard v. Canton, 35 Miss. 189; Hazelhurst v. Mayes, 96 Miss. 656; Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 1, Sec. 239; McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Secs. 862-906.

7 Spengler v. Trowbridge, 62 Miss. 46; Corpus Juris, Vol. 43, Sec. 199.

8 See cases cited in Corpus Juris, Vol. 43, Sec. 213.

set by the courts. The municipal corporation may regulate on municipal subjects upon which the state has acted but not in conflict with the state law. Neither may the regulations of municipal corporations directly or indirectly contravene the general law nor may they be repugnant to the policy of the state as declared in general legislation.[9]

In Mississippi, as in most states, it is held that municipal corporations may prohibit and punish acts which are also prohibited and punishable under the general laws of the state.[10] An ordinance may be passed, under an express grant, providing that all offenses made misdemeanors under the state laws constitute offenses against the municipality within its boundary, incorporating into the ordinance all state laws relative to misdemeanors. In commenting upon this as an implied power, the court has said, "Whether this power to declare acts criminal by the general laws of the state punishable also under town ordinances and thus inflict double punishment for the same offense, can be deduced from a grant in city charter of authority to make by-laws and ordinances for the welfare and good government of the city or other general words of similar import, is a question upon which the authorities are in hopeless conflict."[11] Any conflict in Mississippi is now avoided by an express power being given to the municipality. The power is limited to misdemeanors committed within the corporate limits.[12]

The exercise of municipal powers is subject to the limitations of both the federal and state constitutions. A municipal corporation is also limited in the exercise of its powers to matters which are local and municipal. The corporation is restrained from entering the field of general legislation or making a declaration of public policy. Ordinances and regulations that are unfair, partial and discriminatory, as between persons so situated, are invalid. The ordinances or regulations may, however, discriminate

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9 Leonard v. Canton, 35 Miss. 189; Kosciusko v. Slomber, 68 Miss. 469; Johnson v. Philadelphia, 94 Miss. 34; Crittenden v. Booneville, 92 Miss. 277; Ex parte Bourgeois, 60 Miss. 663; Johnson v. State, 59 Miss. 543.

10 Smothers v. Jackson, 92 Miss. 327.

11 Ex parte Bourgeois, 60 Miss. 663.

12 *Code of 1930*, Sec. 2549; Oxford v. Buford, 134 Miss. 635; Watkins v. Brookhaven, 134 Miss. 556; Bacot v. Laurel, 109 Miss. 275; Richards v. Magnolia, 100 Miss. 249; Dismukes v. Louisville, 101 Miss. 104; Rosetto v. Bay St. Louis, 97 Miss. 409; Hurley v. Corinth, 97 Miss. 396; Oakland v. Miller, 90 Miss. 275; Chisman v. Jackson, 84 Miss. 787.

between different streets or sections or different occupations, classes or articles.[13]

Statutes authorizing the exercise of municipal powers beyond the municipal boundaries are very strictly construed. Statutes of this kind are comparatively few. In Mississippi, powers beyond the corporate limits extend to the control of nuisances and the protection of health, acquisition of property for certain municipal purposes, maintenance of certain highways, establishment of landings and wharves and the supply of water and electricity to those outside the corporate limits.[14]

The general power of managing and controlling the Mississippi municipality is granted by statute to the mayor and board of aldermen or commission. The council is the general agent of the corporation for all purposes and exercises its corporate powers.[15] Powers of the municipal corporation are usually put into effect by the enactment of ordinances, resolutions and by-laws.

ORDINANCES

McQuillin defines ordinances as "local laws of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform and permanent rules of conduct relating to the corporate affairs of the municipality."[16] Municipal ordinances are laws passed by the governing body of the municipal corporation for the regulation of the affairs of the corporation. An ordinance is a mere local law and not a public law in the constitutional sense.[17]

The word by-laws is sometimes used in place of ordinances, but by-laws is the term applicable to the self-adopted rules of all classes of corporations, while ordinances are used generally to refer to the self-governing rules of the municipal corporation. Resolutions usually differ from ordinances in that resolutions deal with matters of a temporary or special character and are ministerial rather than legislative.

An ordinance can be sustained only when based on expressed or necessarily implied power. The limitations and grants of municipal powers in general apply to the ordi-

13 Lizano v. Pass Christian, 96 Miss. 640; Johnson v. Philadelphia, 94 Miss. 34; Crumpler v. Vicksburg, 89 Miss. 214; Grenada v. Wood, 81 Miss. 308; Kosciusko v. Slomberg, 68 Miss. 469; Donovan v. Vicksburg, 29 Miss. 247.

14 *Code of 1930,* Secs. 2396, 2415, 2442, 2449, 2452.

15 *Code of 1930,* Secs. 2392, 2393; Montgomery v. State, 97 Miss. 292.

16 McQuillin's *Treatise on the Law of Municipal Corporations,* Vol. 2, Sec. 632.

17 Corinth v. Sharp, 107 Miss. 696; Corpus Juris, Vol. 43, Sec. 796. See cases cited.

nance making power. Ordinances are enacted under the exercise of a delegated function of legislation, within a certain locality, for particular purposes and subordinate to the general government of the state. Municipal ordinances enacted under state legislation are regarded as acts of the state under the Fourteenth Amendment of the United States Constitution.[18]

Form and Content.—Where the legislature has not prescribed any particular form for an ordinance, the municipal governing authorities may use any form of expression which suits them, provided it is a satisfactory and a sufficient expression of their will.[19]

Statutes and charters usually contain certain provisions for the form and content of ordinances. The general law governing municipalities in Mississippi requires that all ordinances have a title and that the title clearly express the subject of the ordinance. Unless there is a charter or statutory provision requiring it, no title need precede an ordinance. Before the general adoption of the code charter in Mississippi, the special charters sometimes contained no such requirement. The object of the law in regard to having the title clearly expressed in the ordinance is to prevent surprise or fraud on the part of those engaged in enacting the ordinance. The title is to inform the people, as well as the legislators, of the subjects of legislation contained in the ordinance to the end that those engaged in enacting the law may know how to vote and those who expect to obey it may be fully aware as to what it is.[20]

The test for determining whether the title sufficiently indicates the purpose of the ordinance is that it must express the subject in such terms that the law makers and the people may not be left in doubt as to what matters are treated.[21]

Where an ordinance is without a title, it is void in Mississippi under the present general law. The Supreme Court of the State has held, however, that the title must be given a reasonable and liberal construction.[22]

A constitutional provision that no bill may be passed containing more than one subject has no application to municipal ordinances but a general law places the same requirement on ordinances that the constitution places on

18 North American Cold Storage Co. v. Chicago, 211 U. S. 306.
19 Corinth v. Sharp, 107 Miss. 696.
20 *Code of 1930,* Sec. 2544; Richards v. Magnolia, 100 Miss. 249.
21 Richards v. Magnolia, 100 Miss. 249.
22 Sample v. Verona, 94 Miss. 264; Richards v. Magnolia, 100 Miss. 249; Ocean Springs v. Green, 77 Miss. 472.

State legislative acts. An ordinance is required to contain only one subject and this subject must be expressed in the title. This is a mandatory provision and necessary to the validity of the ordinance. A blanket ordinance providing that all offenses made misdemeanors under the State laws shall be violations of the municipality has been held to contain only one subject.[23]

Enactment.—The style of all ordinances is required by law to be as follows, "Be it ordained by the mayor and board of aldermen of the city (town or village) of_____." Ordinances must be read and considered by sections. A distinction is made between ordinances and resolutions. The court has held that a resolution providing for the issue of bonds was not invalid because the resolution did not comply with this style, was not published nor read by sections.[24]

All ordinances are required to be read and considered by sections at a public meeting of the mayor and board of aldermen. The vote on the final passage must be by "yeas" and "nays", which are entered on the minutes by the clerk. No vote may be taken on an ordinance which has not previously been reduced to writing. Ordinances may be adopted at a public meeting on any day except Sunday. Ordinances passed on holidays are valid.[25]

Under the general law governing municipalities, the mayor is given power to veto any measure passed by the board of aldermen. The veto must be made in writing, giving reasons for the veto. This veto may be overruled by a two-thirds vote of the board of aldermen. The power may be exercised only in the case of "measures". An election by the board of aldermen is not a measure and may not be vetoed by the mayor.[26]

There is some doubt as to whether the approval of the mayor in the form of a signature is necessary to the validity of an ordinance. In the absence of charter or statutory provisions requiring positive approval by the mayor of the acts of the board of aldermen it is generally held to be unnecessary. The court has not been called upon to decide this question but the necessity for signature is probably implied in Mississippi. In one case in which a mayor signed an ordinance without having taken the oath of office, the court held that the acts of *de facto* officers bound third

23 Constitution of 1890, Sec. 71; *Code of 1930*, Sec. 2544; Corinth v. Sharp, 107 Miss. 696; Sample v. Verona, 94 Miss. 264; Winfield v. Jackson, 89 Miss. 272.

24 *Code of 1930*, Sec. 2542; Kemp v. Hazelhurst, 80 Miss. 443.

25 *Code of 1930*, Sec. 2543; Griffith v. Vicksburg, 102 Miss. 1.

26 *Code of 1930*, Secs. 2513, 2638; Rich v. McLaurin, 83 Miss. 95.

parties and the ordinance was not invalid because of being signed by a mayor *de facto,* implying that the signature was necessary. The mayor's approval would not be necessary where a veto had been overridden.[27]

In commission cities ordinances and resolutions must be certified to by the city clerk, approved by the mayor, or a majority of the council, published and recorded before they are in force. An exception is made for certain emergency measures in carrying out police powers. The approval of the qualified electors is required in commission cities before certain ordinances go into effect. Ordinances calling for large appropriations, important contracts, franchises and issuance of bonds, after passing the council must be kept on file with the city clerk for two weeks, then approved by the qualified electors at a general or special election.[28]

Record and Publication.—The general law requires the clerk to keep a well-bound book styled "Ordinances, City (Town or Village) of_____" in which he must enter at length every ordinance in force. He is required to make the entry immediately after the passage of the ordinance. In addition to the ordinance the date of its passage and the citation of the book and page of the minutes containing the records of its passage is required. It is the clerk's duty to keep this book accurately indexed alphabetically. The ordinances which are to be recorded are those which are "in their nature, laws" of the municipality and not "mere order or decrees temporary in their nature."[29]

The code charter and statute providing for the recording of ordinances contains no provision that they are not in force until recorded. It has been held that in these circumstances the provisions are merely directory and that a noncompliance does not invalidate the ordinance or resolution. The court has held that it was the duty of the clerk to record the ordinance but where in transcribing an ordinance the clerk failed, the ordinance was yet valid.[30]

Under the commission form of government, ordinances must be recorded in the ordinance book before they become valid. The ordinance book is especially valuable in proving ordinances, the court holding an identified ordinance book as competent proof of the existence of an ordinance.[31]

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27 Sumrall v. Polk, 118 Miss. 687; Corpus Juris, Vol. 43, Secs. 827, 829. See cases cited.

28 *Code of 1930,* Secs. 2641, 2642.

29 *Code of 1930,* Sec. 2545; Rich v. McLaurin, 83 Miss. 95.

30 Greenwood v. Jones, 91 Miss. 728.

31 *Code of 1930,* Sec. 2642; Bugg v. Houlka, 122 Miss. 400; See also Chrisman v. Jackson, 84 Miss. 787; Thomas v. Yazoo City, 95 Miss. 395.

Publication is not an essential requisite of a valid ordinance. An ordinance may be enforced before publication or without publication.[32] The statute provides that "all ordinances and allowances shall, as soon as practicable after they are passed, be published ***."[33] In cities operating under the commission form, publication as well as recording is necessary before an ordinance becomes effective, except for emergency ordinances under the police power, which are passed by a unanimous vote of the council.[34]

Municipalities are empowered to revise and codify their ordinances from time to time in pamphlet or book form. After the revision, arrangement, classification and codification, the pamphlet or book may be adopted, by an ordinance to that effect, as the official code of ordinances of the city. The requirements pertaining to the usual passage of ordinances do not apply in such a case of revision and codification.[35]

Validity.—The question of the validity of ordinances has already been mentioned in regard to the mayor's approval, publication and recording. The fundamental rules of municipal legislation, generally recognized, declare an ordinance to be invalid when any of the following requisites are not complied with: (1) valid municipal corporation, (2) ordinance enacted by proper body in a lawful meeting, (3) passed in the manner prescribed by law, (4) within scope of powers, (5) conforms to charter or statutory requirements as to title and subjects, (6) fair, and the natural construction conveys a reasonable certainty of meaning. In addition to these, an ordinance must not be oppressive, unreasonable, partial, unfair, unconstitutional, inconsistent with public policy, contrary to the charter or statutes, prohibitive of trade nor contraventive to common right.[36]

Ordinances may be valid in some of their provisions and invalid as to others. Where the portion of an ordinance which is invalid is distinctly separable from the remainder, and that remainder in itself contains the essentials of a complete act, the invalid portion may be rejected and the remainder will stand as valid and operative. Where an ordinance is entire, that is, each part being essential to and

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32 Corinth v. Sharpe, 107 Miss. 696.
33 *Code of 1930,* Sec. 2542.
34 *Code of 1930,* Sec. 2642.
35 *Code of 1930,* Sec. 2546.
36 Corpus Juris, Vol. 43, Sec. 853.

connected with the balance, the invalidity of one part renders the whole invalid.[37]

Within constitutional limits, the legislature may subsequently ratify any unauthorized act which it has the power to authorize in the first place.[38] In case a municipal ordinance complies with the statutes but conflicts with a prior ordinance intended to fix a general rule in such cases, the validity of the later ordinance is upheld. The two ordinances have equal weight and the last one enacted is the one in force.[39] Ordinances cannot be avoided by the imputation of bad faith in their passage.[40]

Ordinances must not be violative of the United States Constitution, Federal laws, the State Constitution nor of the State laws or policy. Such a conflict or violation makes them void. An ordinance imposing a license tax on house to house solicitors was held invalid in the absence of a State tax of this kind.[41] The test of the validity of an ordinance cannot be made in the Supreme Court. Parties who in a prosecution for violating a city ordinance agree before entering trial that the city ordinance is valid, cannot afterwards show that the ordinance is invalid.[42]

The ordinances under the police power cover a wide field and it is impossible to give any specific rules as to what ordinances are valid and what are invalid. The police power has been held to include power to make an ordinance to the effect that unmuzzled dogs running at large shall be killed. It did not include ordinances prohibiting the erection of buildings for business purposes or conducting business in the residential portion of a municipality, as interpreted by the Supreme Court of the State in 1923. This latter decision is now of little consequence since the passage of the State Zoning Act in 1926, authorizing by statute the powers refused under the police power of the municipality. Police power changes as our view regarding the proper scope of government changes.[43]

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37 Lewis v. Jane, 129 Miss. 475; Sanders v. Starkville, 128 Miss. 742; Wasson v. Greenville, 123 Miss. 642; Cook v. Pascagoula, 121 Miss. 5.

38 Griffith v. Vicksburg, 102 Miss. 1.

39 Jackson v. Williams, 92 Miss. 301.

40 State v. Fire Co., 76 Miss. 449.

41 Desporte v. Biloxi, 136 Miss. 542; Kosciusko v. Textile Co., 139 Miss. 220.

42 Lee v. Oxford, 134 Miss. 647; Thomas v. Yazoo City, 95 Miss. 395.

43 *Code of 1930*, Secs. 2474-2481; Fitzhugh v. Jackson, 132 Miss. 585; Julienne v. Jackson, 69 Miss. 34; Mayor v. Hart, 128 Miss. 353; Kratzer Lumber Co. v. Morehead, 118 Miss. 736; Vicksburg v. Mullane, 106 Miss. 109; Ex parte O'Leary, 65 Miss. 80.

Reasonableness of an ordinance must depend upon the facts of individual cases and upon opinions of courts. An ordinance closing a roller skating rink at six o'clock in the evening is certainly unreasonable while an ordinance requiring taxicab drivers to satisfy the mayor and council of their fitness to operate an automobile might easily be held reasonable and not arbitrary. An ordinance was held unreasonable and in restraint of trade which restricted the sale of second hand clothing unless it was shown from what locality it came.[44]

Repeal, Amendment and Revision. — Ordinances of Mississippi municipalities may be amended or revised by the enactment of a new ordinance containing the entire ordinance as revised or the section or sections as amended. Incomplete ordinances may be completed by a later ordinance. The power to repeal ordinances is, by necessary implication, as broad as the power to enact them and the same method of procedure is used. The power of repeal cannot be exercised where the ordinance is contractual in its nature or effect, except with the consent of the other party or parties or unless the power to repeal without consent of second parties is reserved by the original ordinance. An act granting a franchise which is a mere license to enjoy the privilege conferred for the time and on the terms specified, is subject to future legislative control and may be taken away by an act of the body granting it.[45]

Construction.—The same general rules apply to the construction of ordinances as apply to the construction of statutes. A fundamental rule is to ascertain and give effect to the intention of the board or council. In arriving at the intent the facts and circumstances surrounding the enactment may be considered. Naturally where the language is clear and explicit and free from ambiguity, there is no room for construction. The construction should be resolved in favor of validity where there is reasonable doubt on such question. The proper construction is a question for the court and not for the jury. The words of the ordinance will be taken in their ordinary and proper significance unless enlargement or modification is necessary to effectuate the legislative intent. Very strict interpretations are put

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44 Johnson v. Philadelphia, 94 Miss. 34; Mayor v. Hart, 128 Miss. 353; Kosciusko v. Slomberg, 68 Miss. 469.

45 *Code of 1930,* Sec. 2544; Bryan v. Greenwood, 112 Miss. 718; Amite County School Board v. Reese, 108 So. 439; Stone v. Mississippi, 101 U. S. 814.

on ordinances restricting the rights of private property owners.[46]

Ordinances authorized by the charter of the municipality enacting them have the same force and effect within the municipal territory as acts of the legislature. Under the general law, ordinances are not to be enforced, "unless for cause the contrary be ordered," for one month after passage. General blanket ordinances such as an ordinance making all offenses misdemeanors against the State to be also misdemeanors against the municipality, are self operative.[47]

Appeals.—In a prosecution for violation of a municipal ordinance it is not necessary to plead an ordinance in a municipal court since municipal courts take judicial notice of ordinances. For prosecution it is only necessary to show that the ordinance was violated and that the violation took place within the corporate limits.[48]

An appeal from a municipal court for violation of an ordinance goes to the circuit court. The circuit court does not take judicial notice of ordinances and in a prosecution for violation of an alleged ordinance, a conviction will not be sustained if the evidence fails to show the existence of the ordinance. It is a general rule that in the absence of statutory provisions to the contrary, courts having no special function to enforce ordinances or by-laws of a municipal corporation will require the pleading of ordinances. The title of the ordinance is not sufficient in the circuit court but the entire ordinance, identified and certified, must be introduced in evidence.[49]

The municipality may appeal certain criminal cases to the Supreme Court. These cases include: (1) appeals from a judgment sustaining a demurrer to or a motion to quash an indictment, or an affidavit charging crime; (2) appeals from judgments acquitting the defendant where a question of law was decided against the municipality; (3) appeals from rulings adverse to the municipality in all cases in which the defendant was convicted and prosecuted an ap-

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46 Wesson v. Collins, 72 Miss. 844; Kratzer Lumber Co. v. Morehead, 118 Miss. 736; Pass Christian v. Washington, 81 Miss. 470; Union v. Ziller, 151 Miss. 467; Giardina v. Greenville, 70 Miss. 896.

47 *Code of 1930,* Sec. 2542; New Orleans Waterworks C. v. New Orleans, 164 U. S. 471; Cook v. Pascagoula, 121 Miss. 5; Chrisman v. Jackson, 84 Miss. 787.

48 McAlister v. Moss Point, 96 Miss. 686.

49 *Code of 1930,* Secs. 64, 68, 1564; Greenwood v. Weaver, 96 Miss. 604; Puyper v. Picayune, 134 Miss. 492; Kyle v. Calhoun City, 123 Miss. 542; Naul v. McComb, 70 Miss. 699.

peal.[50] The Supreme Court does not take judicial notice of ordinances. However, where an ordinance was offered as evidence in a criminal trial in the circuit court without objection, it cannot be objected to for the first time in the Supreme Court. Failure to object in the circuit court was a waiver of the obligations on the municipality to prove the ordinance.[51]

Whenever it is necessary to prove the existence of an ordinance, a copy of the ordinance certified by the clerk or the ordinance book in which the ordinance is entered may be introduced as evidence. Either of these methods is prima facie evidence of the existence of the ordinance and evidence that it was enacted in the manner prescribed by law. Presumption is that an ordinance was passed at a meeting held at the proper time and place when there is no evidence to the contrary.[52]

POLICE POWER

The police power is an attribute of sovereignty and is inherent in every State of the United States. Any attempt at a definition will fall short in some respect, since no one can foresee the ever changing conditions which may call for its exercise. The Mississippi Court merely holds that, "The police power extends to wholesome restrictions on property and individuals in order to secure general health, comfort and prosperity of the State."[53]

The source of the police power of a municipal corporation is the State. Police power may be delegated by the State Legislature where the constitution does not restrict. In the absence of constitutional limitations the legislature may confer police power upon the municipal corporation over subjects within the provisions of existing State laws. Ordinarily, under their police power municipal corporations may regulate on municipal subjects on which the State has acted but not in conflict with general law.[54]

While the very foundation of the police power is the control of private interests for the public welfare, the municipal police power must be so exercised as not to infringe arbitrarily or unreasonably upon private rights whether they are of person or property. Power to regulate

50 *Code of 1930,* Sec. 19; Jackson v. Harland, 112 Miss. 41; Water Valley v. Davis, 73 Miss. 521; Naul v. McComb, 70 Miss. 699.

51 Watkins v. Brookhaven, 134 Miss. 536; Kyle v. Calhoun, 123 Miss. 542; Morris v. Greenwood, 73 Miss. 430.

52 *Code of 1930,* Sec. 2547; Greenwood v. Jones, 91 Miss. 728.

53 Hart v. State, 87 Miss. 171.

54 Corinth v. Crittenden, 94 Miss. 41; Ex parte Bourgeois, 60 Miss. 663; Johnson v. State, 59 Miss. 543.

does not ordinarily include power to prohibit or suppress.[55]

Police power is a governmental function necessary in the performance of governmental duties. The police power must be distinguished from the power of taxation. Taxation is for the purpose of raising revenue; the police power is for the purpose of regulating or restricting, although it may do this by means of taxation and licenses. In order that a municipal regulation may be sustained as an exercise of the police power, the regulation must have as its real object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare.[56]

The police power may be said to extend to all the great public needs. Somewhat more specifically we may say that it extends to the public health, morals, order, peace, safety, protection of property and the general welfare. Each case questioning the extent of the police power must be decided on its own individual merits and in relation to the public needs. It is well recognized that a function of the police power of a municipal corporation is to promote the public safety and preserve the general welfare by regulating all things hurtful to the comfort, safety and welfare of their inhabitants or all things hurtful to the public interests. It is not only the right but the duty of a municipal corporation to pass such regulations as may be necessary.[57]

A municipal corporation may, under its police power, enact all regulations or ordinances necessary for the preservation of good order in the community. These regulations must not be unfair, partial, discriminatory or unreasonable.[58]

Municipal regulations preservative of peace and order do not assume to punish crime against the State but are confined to small offenses and lighter demonstrations of violence and disorder tending toward crime.[59]

Nuisances.—The power to suppress nuisances is exercised as a part of the police power. The abatement of nuisances by a municipal corporation is purely a governmental function.[60]

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55 Johnson v. Philadelphia, 94 Miss. 34; Crittenden v. Booneville, 92 Miss. 277; Ex parte O'Leary, 65 Miss. 80.

56 Johnson v. Philadelphia, 94 Miss. 34.

57 Crumpler v. Vicksburg, 89 Miss. 214; Vicksburg v. Mullane, 106 Miss. 199.

58 Ex parte Bourgeois, 60 Miss. 663; Kosciusko v. Slomberg, 68 Miss. 469; Johnson v. Philadelphia, 94 Miss. 34; Ex parte O'Leary, 65 Miss. 80; Jackson v. Newman, 59 Miss. 385; Pieri v. Shieldsboro, 42 Miss. 493.

59 Johnson v. State, 59 Miss. 543.

60 Green v. Lake, 60 Miss. 451; Lake v. Aberdeen, 57 Miss. 260.

The general code charter empowers municipalities to make regulations to secure the general health of the municipality and to prevent, remove and abate nuisances. An enumeration of some well recognized nuisances follows, with authorization as to their control. Although primarily it is within the power of municipal authorities to determine and declare what constitutes a nuisance, a municipal corporation cannot make a thing a nuisance by merely declaring it to be such. The nuisance must be one in fact and must fall within some law or general ordinance previously passed. The power is limited to such things as the common law or statute declares to be nuisances.[61]

In an early case before the court a corn and flour mill was complained of as a nuisance because of the noise, danger of fire, and the danger to the health of the community. No complaint or warning was made to the owner for the period of five years operation. Residents near the mill sought an injunction to abate the so-called nuisance. The court in its decision said: "To abate a public nuisance, the public authority must move. A private action, either at law or in equity, will not lie, unless the plaintiff has sustained some special damage. *** A perpetual injunction ought not to be decreed if the owner can apply to his steam power and machinery such alterations and appliances as will relieve them from the special and unusual annoyances complained of. A chancellor ought to be well satisfied that the grievance is serious and well founded and that there is no remedy short of cessation of such use before he will abate it as a nuisance by injunction."[62]

The legislature cannot, constitutionally, declare that any use of a particular piece of land is harmful and a nuisance, nor may it authorize a municipality to do so. The court would not uphold the legislature's authorization of Bay St. Louis to declare a private residence a nuisance because it interfered with the enjoyment of other property owners by obstructing the view and shutting out the gulf breeze.[63]

The court attempts to decide question as to the power over nuisances in such a way that property will not be subject to the uncontrolled will of the temporary municipal authorities. The authority of the municipality is limited to actual nuisances. An ordinance that hogs should not be

61 *Code of 1930*, Secs. 2396, 2406, 2868, 2880; Desporte v. Biloxi, 136 Miss. 542; Comfort v. Kosciusko, 88 Miss. 611; Ex parte O'Leary, 65 Miss. 80; Lake v. Aberdeen, 57 Miss. 260; Quintini v. Bay St. Louis, 64 Miss. 483.

62 Green v. Lake, 54 Miss. 540, 545-546.

63 Quintini v. Bay St. Louis, 64 Miss. 483.

kept within the municipal limits, without reference as to whether they were a nuisance or not was held invalid. If the hogs were a nuisance in fact, the action would be upheld but the authorities could not declare the mere keeping of hogs a nuisance.[64]

Obstructions may or may not be nuisances. Thus a temporary or partial obstruction of a street by a railroad company while laying conduits across the street in its right of way was held not to be a nuisance. However, an obstruction of a street which is continued and destroys the easy ingress and egress to and from a property, with a consequence damage of real property, is a nuisance.[65] Further than this, municipal corporations are governed by the general statutes covering the subject of nuisances.[66]

Zoning.—In 1926, a standard zoning law was passed by the legislature, empowering the legislative bodies of cities over five thousand inhabitants to regulate the height, number of stories and size of buildings and other structures. It also included power to determine the percentage of the lot that may be occupied, the size of yards, density of population, use and location of buildings and land for trade, industry or residence. The exercise of the right of eminent domain was also extended for the purpose of obtaining land for playgrounds and parks. The zoning act was authorized under the state police power for the purpose of promoting the health, safety, morals and the general welfare of the community.[67]

The zoning act describes the purposes in view, specifies the manner of districting the city and the method of procedure to be used by the governing body of the city in providing the zoning ordinance. Provision is made for public hearings and protest by those affected by provisions and amendments. Remedies for violation are also provided.[68]

The zoning act has been utilized by the municipalities to only a small extent and decisions of the state courts are few and relatively unimportant. In one of the first cases to reach the Supreme Court in 1927, the court said, "The serious question as to the constitutionality of the Zoning Act we decline to pass upon at this time. *** Municipal authorities should bear in mind that there are different limitations in different constitutions of various States, and

64 Comfort v. Kosciusko, 88 Miss. 611.

65 Canton v. Canton Warehouse Co., 84 Miss. 268; Meridian Light & Ry. Co. v. Slaughter, 98 Miss. 420.

66 *Code of 1930,* Secs. 2868-2880, also 2396, 2406.

67 *Code of 1930,* Sec. 2474.

68 *Code of 1930,* Secs. 2475-2481.

that when they undertake to exercise the authority granted by the legislature they are dealing with a most grave and delicate question and should confine themselves to the authority expressly granted by the legislature.'' In this case the court held that power given under the Zoning Act to ''regulate and restrict'' erection of buildings, within established districts, does not authorize it to prohibit a filling station building.[69]

All municipalities are empowered to establish fire limits and to regulate, restrain and prohibit the erection of buildings made of combustible materials within certain fire limits prescribed by ordinance. Cities and towns are further empowered to adopt regulations for the prevention of fires. These regulations cover such subjects as the storing of combustible materials, examination of dwellings and buildings, prescribing the construction and building of chimneys, smokestacks and flues. These ordinances and regulations for the prevention of the destruction of property by fire must be reasonable.[70]

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69 Dart v. Gulfport, 147 Miss. 543, 550.

70 *Code of 1930,* Secs. 2428, 2440, 2441, 2504; Union v. Ziller, 151 Miss. 467; Bradley v. Jackson, 153 Miss. 136.

THE ADMINISTRATIVE USE OF MANDAMUS IN MISSISSIPPI

By J. B. Hutton, Jr.

Mandamus is used to command an officer or board to do or not to do an act the performance or omission of which the law enjoins as an official duty where no specific remedy in the ordinary course of law is provided. (Sec. 2542 code of 1880; Sec. 2846 code of 1892; Sec. 3231 code 1906; Sec. 2533 code 1917; Sec. 2348 code 1930.) Where discretion is allowed the officer mandamus will not be used to control his decision. It will be used to compel the exercise of discretion, however. The duty must be clear and definite. Other legal remedy must be wanting. Mandamus will not be granted where it would be futile or where public interests conflict.

While the cases in which the rules of the common law and of the statutes have been applied are consistent in maintaining these general principles, the determination of each case has really turned on the construction of the statute governing official action and duty. When the duty is declared to be present or not to be present, and when the officer's determination of his duty is declared to be final or not to be final, then the resolution of the case is swift. (Cf. Wood-Strother, 76 Cal. 545.)

These things have appeared in cases growing out of the following situations:

I.

In matters involving a clear duty,—

The payment by a county of claims audited and approved by a county board of supervisors is enforceable by mandamus, since this is expressly required by statute. Sec. 311 code 1906, Sec. 1520 code 1871.

In Klein-Board of Supervisors (1876), 54 M. 254, mandamus issued to compel a county treasurer to pay a warrant ordered by the supervisors and issued in payment of a claim allowed by them. If the county is without funds the levy of a tax may be enforced by mandamus, it is said. Other cases in accord with this case are Carroll-Board of Police, 28 M. 38; Hendricks-Johnson, 45 M. 644; Pass Christian-Murphy, 68 M. 84; Hebron Bank-Lawrence County, 109 M. 397.

In Ross-Wimberley, 60 M. 345, a case involving a claim audited and allowed by a board of aldermen, mandamus was issued against the mayor to compel the issuance of a warrant; and in Kelley-Wimberley, 61 M. 548, to compel payment of said mayor's warrant mandamus issued against the treasurer. See also 83 So. 748.

In Honea-Board of Supervisors, 63 M. 171, it was held that failure to present a claim to the county board of supervisors for allowance is fatal; the order of the board is its basis as a judgment; neither is the issuance of script by the board a proper judgment to serve as a basis of the payment of claims against the county. Invalidity of the judgment defeats the action, Board-Steele, 124 M. 711; as does also the illegality of the claim allowed, Files-McWilliams, 49 M. 578.

Mandamus was held to be the proper means to compel the levy of a tax to pay warrants issued in satisfaction of a judgment against a county, in Taylor-Board of Supervisors, 70 M. 87, and Warren County-Klein, 51 M. 809.

The issuance of a warrant to pay claims allowed by the supervisors may be compelled by mandamus against the clerk of the board. (Arthur-Adam and Speed, 49 M. 404; McGraw-Board, 125 M. 420; Town of Crenshaw-Jackson, 122 M. 711.)

The assessment and levying of taxes, and the collection and disbursement thereof to the proper person is enforceable by mandamus.

Taylor-The State, 121 M. 771: By state law, Ch. 98 laws 1916, the State Tax Commission was given power to equalize taxes between counties by ordering increased or decreased evaluation of classes of property by the board of supervisors. By this statute the decision of the State Tax Commission is made final, and a ministerial duty is imposed on the board of supervisors to make a horizontal increase in the classes designated in the order of the Commission. Mandamus is the proper remedy to compel obedience, since the state has no adequate remedy in the ordinary course of law. For refusing to obey the writ the supervisors were adjudged in contempt and were fined and imprisoned. In accord, State ex rel Foreman-Wheatley, 113 M. 555, which also sustains the statute in question and gives it a like construction.

In McNeill-McElroy, 15 So. 786, mandamus was issued to compel collection of a tax by a town marshal who had refused to collect the tax when assessed by the mayor and

aldermen. In accord, Adams-Clarksdale, 95 M. 88. Before the levy of a tax can be compelled the conditions precedent to its payment must be fulfilled. In Beard-Board of Supervisors of Lee County, 51 M. 542, it was held mandamus does not lie to compel supervisors to levy a tax to cover a deficit in a school budget that remained after the state school tax was paid into the county, on the ground that the state auditor and state superintendent of education had not made a report to the supervisors at their annual meeting as required by statute designed to enable them to balance their budget and pass on all county taxes at one time. No duty was imposed on the board to levy the tax in absence of these conditions.

Neither will mandamus issue to compel a taxing authority to exceed statutory limits of the taxing power. In Jonestown-Ganong, 97 M. 67, a judgment against a town had been unpaid for fifteen years. The town was unable to levy a tax without exceeding the limit set for corporate taxation. Mandamus was denied to compel the levy of a tax; but was granted to compel the issuance of a warrant for the judgment, and the filing of the warrant with the town treasurer as a claim prior to debts subsequently arising.

The power to distribute the state's money is in the hands of the legislature. The state auditor cannot be compelled to make payment in absence of statutory authority shown. Accordingly the I. I. and C. case, 81 M. 174, denied mandamus when sought to compel payment of interest on trust funds of a school where no statutory provision designating the manner of payment or the persons to whom payment should be made. For Section 63 of the Constitution of 1890 required appropriations to be made in definite amounts, and forbade standing appropriations. Also Section 230 code 1892 forbade payment "without appropriation for the purpose." Hence there was no duty on the auditor to pay, and mandamus did not lie. In accord, Swan-Buck, 40 M. 268; Swan-Work, 24 M. 439; Cole-Wineman, 80 M. 73.

Mandamus will not issue to compel the auditor to issue a warrant in payment of a reward proclaimed by a governor in excess of his authority. (Jones-Gibbs, 51 M. 401.) Such proclamation raises no duty and does not bind the state.

Payment of coupons on bonds of a bank in which the state was interested cannot be compelled by mandamus against the state treasurer unless a warrant is issued by the auditor as required by statute. (Wilson-Griffith, 24 M. 468.)

Payment of teacher's warrants issued without authority of law cannot be compelled by mandamus against the county depositary, even though in the hands of a purchaser for value without notice. The instruments are not negotiable, are merely evidence of a debt, and in this case raise no duty to pay. (Cleveland-Bank-Exchange Bank, 119 M. 868.)

Payment to persons not authorized by law to receive funds from the tax gatherer is not enforceable by mandamus. (Ross-Lane, 11 M. 695.)

But payment of state officers' salaries duly authorized (Hardee-Gibbs, 50 M. 802) and of fees allowed clerks for services in court by the court pursuant to the law (Chatters-Board of Supervisors, 73 M. 351) is enforceable by mandamus. Also repayment of purchase money where patents are cancelled by the state by statutory summary procedure is enforceable by mandamus. (Wilson-Naylor, 116 M. 573.) The payment of a tax collected for roads into the separate road fund provided for by statute (Board-Pidgeon Iron Company, 114 M. 274) and payment to a county of its distributive share of the common school fund by the state auditor are properly enforceable by mandamus (State-Stone, 69 M. 375). Again, mandamus is the remedy to compel payment of firemen's pensions to cities by the State Insurance Commissioner under state statute, it is said. (Henry-Donovan, 114 So. 482.)

The issuance of bonds after they are duly authorized by vote of the qualified electors of a district is ministerial and subject to mandamus directed to the supervisors. (Board of Supervisors-Dean, 120 M. 334.)

In a dozen miscellaneous cases involving performance of official duties in regard to education, elections, utilities, examination of public records, maintenance of county line fences, issuance of liquor licenses the use of mandamus is shown. Where a clear duty is shown it is the proper remedy as in the preceding cases.

In Brown-Owen, 75 M. 319, mandamus issued to compel a school superintendent to contract with a teacher elected by the trustees of the school. By state statute the duty was clear and did not involve discretion. In accord, State ex rel Baria-Alexander, 130 So. 755; 76 M. 783.

In Clark-Board of Trustees of the Loper Line, 117 M. 234, mandamus was declared to be the proper remedy to compel admission of resident children of educable age to public school. By state law such children have a clear

right to admission. Administrative remedies need not be exhausted. In accord, 114 M. 560 holding the school administration has not exclusive jurisdiction of this question of admission and judicial review is allowed when the authorities exceed the law; also Hobbs-Germany, 94 M. 469.

In Bourgeois-Fairchild, 81 M. 708, the duty imposed by charter on a mayor to certify election returns made by town commissioners as judges of the elections is ministerial and is enforceable by mandamus. However, proceedings in mandamus can not be used to try a contested election. And an order to the judges of an election to produce the ballot boxes and tally sheets before the certifying official for recount is reversed in McHenry-State, 91 M. 562. Only the ministerial duty of each officer to certify the judges' return is enforceable by mandamus. The scope of the writ is ever limited to enforcement of statutory official duties. (State-Board of Supervisors, 91 M. 582.) Where election commissioners refused to count votes of an entire precinct, the court held their statutory duty was not done and issued mandamus to compel performance. (State ex rel Hudson-Piggott, 54 So. 257.)

State-Benson, 108 M. 779, held mandamus lies to compel a purchaser of a public utility franchise to operate the plant. The purchaser cannot retain the benefits of the franchise and avoid the legal obligations of an involuntary trustee of a public trust; hence the duty; and the remedy, mandamus. Mandamus will not issue to compel a street railway company to run cars on a track declared to be a nuisance by proper authority; until such condemnation is reversed it is the duty of the company not to run cars on that track. (Wright-Edwards Hotel and City Railway Company, 101 M. 470.)

In G. & S. I. Railway-Collins, 157 M. 213, mandamus was sought to compel a railway company to maintain a crossing. The writ was granted, and the order was reversed on appeal on the ground the crossing had not been dedicated or properly condemned; and, hence, no duty existed to maintain it. An interest in land cannot be taken from a railway by the mere fiat of town authorities. Where a highway is duly authorized mandamus will issue to compel a railway to maintain crossings and bridges. (I. C. Ry.-State, 94 M. 759; I. C. Ry.-Swalm, 83 M. 631.)

In Hiawatha Gin Co.-Mississippi Cotton Ass'n., 138 M. 605, mandamus was sought to compel a ginner to permit inspection of all records of ginning by a cotton marketing

association. State statute required public ginners to keep records of all cotton ginned and to permit inspection by persons "interested to make it." (Hem. code, Sec. 4750.) The statute was construed to permit inspection by persons having reason to trace specific bales of cotton not to permit a fishing expedition. Mandamus was accordingly denied. The court followed the holding in Federal Trade Commission-American Tobacco Company, 264 U. S. 298, which denied unlimited access to warehouse records on the part of the Federal Trade Commission seeking to discover possible violations of the law as to unfair competition. Again, the case turns on the construction of the statute giving right of inspection. It is presumed that if there had been a right the remedy would be mandamus.

In Harris-State, 72 M. 960, mandamus issued to compel a sheriff to issue a liquor license. This was a ministerial duty in the days before prohibition.

Where one county passes a law requiring owners of cattle to fence them in, an adjoining county that has not adopted such a law is under a duty to put up a county line fence, by the state cattle law. It is the duty of the supervisors to have this fence constructed, and the duty is ministerial. It can be enforced by mandamus. (Montgomery County-State, 71 M. 153; and also 70 M. 769.)

The ministerial duty of a justice of the peace to organize and convene a board of assessors to act in eminent domain proceedings is enforceable by mandamus. (Sullivan-Y. & M. V. Ry., 85 M. 649.)

II.

In cases involving discretion,—

Boards and officials may be compelled to exercise discretion; how this discretion shall be used is not subject to control. The cases in which this limitation is set to the use of mandamus concern the hearing of claims against counties presented to the board of supervisors, the assessment and expenditure of taxes, approval of official's bonds, the judging of elections, municipal administration, the duties of bureaus.

In Madison County Court-Alexander, 1 M. 523, mandamus was issued to compel a court to hear, as a board of police, claims for services performed in building a county court house. How the court should act was to its own discretion. Where a board has heard a claim and has acted on it mandamus does not lie. (Portwood-Montgomery, 52

M. 523.) Beside the reason that the matter is discretionary, another remedy is available by appeal. To attempt to direct what amount shall be found due when a claim is presented to a board would control their discretion, and this is an improper use of mandamus. (Board of Police of Attala County-Grant, 17 M. 77.)

Where a board of supervisors is given power to decide whether a petition for a special school tax is signed by a majority of taxpayers mandamus will not be issued to compel a board to change a decision reached. (Board of Supervisors-Walker, 126 M. 595; Board-Lee, 113 So. 194.)

In State-Simmons, 70 M. 485, a tax assessor was ordered by writ of mandamus to assess forty-three shares of capital stock against a company as required by law. The court said that it was improper to direct what deduction should be made from the value of the stock in order to make allowance for the value of tangibles as the then law directed, but that to command the assessor to exercise his discretion and make the assessment was within the scope of mandamus; and it so ordered.

Additional assessment for additional benefits of a public work may be compelled by mandamus when a drainage district refuses to make such assessment in order to pay for the work. (Anderson-Robbins, 137 So. 476.)

The attempt to control by mandamus the discretion given a board of supervisors in using maintenance funds for roads is a reversible error. (Board of Supervisors-Weatherford, 75 So. 114.)

The approval of official's bonds on the part of the board of supervisors or of the clerk of a court involves discretion and cannot be controlled by mandamus, the discretion having been exercised. (Shotwell-Covington, 69 M. 735; Swan-Gray, 44 M. 393.)

The discretion given a mayor and board of aldermen to select a depositary of funds is not subject to control by mandamus. (Pearl River County-Picayune, 126 M. 473.) The discretion given a board of supervisors to select a responsible person to drive a school bus is not subject to control by mandamus. (Henry-Donovan, 114 So. 482.) Where a statute gives a county board of education discretion in creating school districts mandamus will not be used by the courts to dictate the terms of the board's decision. (State-Morgan, 112 So. 865.)

Where a statute gives a board of supervisors discretion in accepting reports of road commissioners and in laying

out roads mandamus cannot be used to compel adoption of the commissioners' reports. (Haskins-Board of Supervisors, 51 M. 406.)

Where a town charter gives power to aldermen to judge the election and qualification of their own members mandamus cannot be used to compel the aldermen to declare a candidate elected. Such charter gives the aldermen discretion in the matter of elections. (Mayor and Aldermen-Rainwater, 47 M. 547.) The court will compel by mandamus election officials to make returns as required by law, but will not designate the person to be declared elected. (Meyers-Chalmers, 60 M. 772; State ex rel Brewer-Abbay, 82 M. 559; State-Brown, 90 M. 876; Ruhr-Cowan, 112 So. 386.)

Penitentiary trustees are given discretion by statute to use convicts on state owned farms or on land leased by the state. Mandamus does not lie to control the trustees' discretion in the matter. (State-Henry, 87 M. 125.)

The state livestock sanitary board is given discretion in choosing such inspectors as may be needed in eradicating cattle ticks. Mandamus does not lie to compel the board to select more inspectors than they deem necessary. (State-Board, 133 M. 62.)

An order by mandamus directing the purchase of specified road implements by the board of supervisors is unwarranted when a statute gives the board discretion in buying implements to maintain roads, for such order controls the board's discretion. (Board-State, 63 M. 135.)

The extension of a municipal water system to a suburb is discretionary. Mandamus does not lie to compel such extension. There is here no duty to extend the system to the suburb. (City of Greenwood-Provine, 143 M. 42.)

The inclusion and exclusion of property in zones, under a city zoning statute, involves discretion. This discretion given to city commissioners is not subject to control by mandamus. (Jackson-McPherson, 130 So. 287.)

Where a duty to determine whether a license should be given an insurance company is imposed on an insurance commissioner, and the duty is held to involve discretion, mandamus is denied when sought to compel revocation of a license granted. (Cole-State, 91 M. 628.)

In Woodberry-McClurg, 78 M. 831, a petitioner sought mandamus to compel the state attorney general to give an opinion favorable to persons desiring to be incorporated. The writ was denied on the ground that the court will not

pass upon or control the opinions of the attorney general, since discretion is involved.

III.

Where the act sought to be performed is not defined, mandamus will not lie,—

Where mandamus for payment of a warrant payable in Confederate money was sought, since payment in the equivalent of Confederate money as of the date of the warrant was called for, the court held there was no authority to determine in such proceeding the value due. Where anything remains to be done or facts are to be found the court cannot give relief by mandamus. (Clayton-Williams, 49 M. 311; Beaman-Board of Police, 42 M. 237.) Where an uncertain amount is sought it must be reduced to judgment before mandamus will be issued. (State Board-West Point, 50 M. 638.)

IV.

Where other remedy is available,—

Where a board of supervisors refused to alter an order directing issuance of bonds and a statutory appeal is available (Section 3231 code 1906) mandamus does not lie. (Robinson-Board of Supervisors, 105 M. 90.) Where an appeal from an order of a board of supervisors refusing to allow a claim is provided, Sec. 311 code 1906, mandamus does not lie. (Pearl River County-Lacey Lumber Company, 128 M. 885; Young-Leflore County, 81 M. 466.)

And where an action to reduce a claim to a judgment is available mandamus does not lie. (State Board-West Point, 50 M. 638.)

Where an appeal from the decision of election officials is allowed, Sec. 6748 Hemingway's code, mandamus does not lie. (Ruhr-Cowan, 112 So. 386; Board-Lee, 113 So. 194, appeal being allowed by Sec. 80 code 1906.)

V.

Where it is futile to issue mandamus,—

Mandamus to compel recount of primary votes would be futile after the general election is passed, and hence the writ is denied. (State ex rel Horton-Lawrence, 121 M. 338.) To reform a party ticket after the election is futile, and for this purpose the writ is denied. (State ex rel Brewer-Abbay, 82 M. 559.) If the procedure permitted, the trial

of a contested congressional election and the issuance of credentials to a second candidate would be futile because not final; and hence the writ is denied. (Meyers-Chalmers, 60 M. 772.)

To expunge a void order of aldermen cancelling an assessment is unnecessary, and for this mandamus is denied. (Adams-Clarksdale, 95 M. 88.)

Since the court cannot, by reason of the checks and balances of constitutional theory, coerce a governor, it will not issue mandamus against him, for this would be mere advice. Advice is futile; and the court will not do a futile thing. (V. & M. Ry.-Lowry, 61 M. 102.)

VI.

Where mandamus is discretionary with the court, although an official duty be unperformed,—

Where a candidate enters a party primary and is defeated, and attempts to run independently in violation of his implied promise to remain in his party, the court will not assist him in disregarding his party pledge by granting mandamus to compel the printing of his name on the ballot. (Ruhr-Cowan, 112 So. 386.)

Where a taxgatherer was overpaid one year, and the excess was held back the next, even though legally he be entitled to full commission for the second year, mandamus will not issue to compel payment. It is denied to avoid circuity of action, this being within the court's discretion, it is said. (Bogan-Holder, 76 M. 597.)

Mandamus will not be issued to compel issuance of pay certificates by school trustees and superintendents to a teacher discharged for violation of the criminal law even though the discharge was not authorized by law. The teacher had insisted on teaching while he had smallpox. This was a violation of law. He was summarily discharged. To aid recovery for the subsequent months would be against public policy, and the court exercised its own discretion to deny relief even though it be conceded to be legally due. (Overstreet-Lord, 160 M. 444.)

A statute required the county superintendent of education to contract with the publishers of books selected by the county text book commission. Books were selected but the superintendent refused to contract. The commission selected other books, and the books were contracted for by the superintendent, were bought and put in use. Mandamus was denied to enforce execution of a contract with the first

publishers, for public rights had intervened and it is in the discretion of the court to deny the remedy in such case although there be, as here, a clear legal right. (Effingham, Maynard Co.-Hamilton, 68 M. 523.)

Note on Procedure in Mandamus Cases,—

The procedure in the earlier cases followed the common law procedure, since there was no statute governing. Later statutes modified the common law procedure and assimilated the procedure to that in an action for damages.

At common law a motion based on an affidavit was made in open court for a rule to show cause why mandamus should not issue; if no cause was shown, after notice given the respondent, the rule was made absolute and an alternative writ was issued. Like a declaration the alternative writ contained all facts necessary to show the relator was entitled to relief. The return to the alternative writ was required to show performance or to set forth matter in excuse or avoidance, or objections to the form and substance of the writ. The respondent could appear in answer to the rule and show cause or make response in his return to the alternative writ. If the alternative writ did not conform to the affidavit and accompanying papers and the rule nisi, it could be quashed. (Haskins-Board of Supervisors, 51 M. 406; Swan-Gray, 44 M. 393.)

By statute (Sections 533, 1517, 1519 code 1871; Section 2544 code 1880; Section 2848 code 1892; Section 3233 code 1906; Section 2535 code 1917; Section 2350 code 1930) mandamus is granted upon a petition which must state the facts constituting the cause thereof; and, if preferred by a private person, it must state also his personal interest. The petition is an ex parte application. If it make out a prima facie case the judge orders the writ to issue, without making the rule nisi and giving the defendant notice. The petition serves in the place of the motion, affidavit and supporting papers, and the rule nisi of the English practice, as these comprised the material out of which the alternative writ was made. The petition constitutes the suggestions which are carried forward into the alternative writ, (Swan-Buck, 40 M. 268) and must be stated fully and with reasonable certainty (Chatters-Board, 73 M. 351) to give notice of the grounds of relief and of the act to be performed. It must be complete in itself, since it is both summons and declaration.

By Section 1520 code of 1871 the pleadings and procedure are made the same as in an action for damages. For

example, the facts on which a claim against a county rest must be shown even though a warrant therefor has been issued; and the facts may be contested after the return. (Polk-Board, 52 M. 422; Board-Arrighi, 54 M. 668; Cleveland State Bank-Exchange Bank, 119 M. 868.)

The respondent may move to quash, demur, or make answer. The relator is not bound by the return or answer, but may meet it by demurrer, traverse, or other appropriate pleading. (Haskins-Board; State Board-West Point, 50 M. 638.)

Before this act the return was taken as true. (Swan-Gray, 44 M. 393; Swan-Work, 24 M. 439; Board of Police of Attala County-Grant, 17 M. 77; Carroll-Board of Police, 28 M. 38; Beaman-Board, 42 M. 237.)

Further, by act of April 5, 1876, p. 56, the petition takes the place of the alternative writ and is the principal pleading, stating plaintiff's claim; and the defendant must plead to it. (Klein-Board of Supervisors, 54 M. 254; Chatters-Board, 73 M. 351; Sec. 2545 code 1880; Sec. 2848-9 code 1892; Sec. 3234 code 1906; Sec. 2536 code 1917; Sec. 2351 code 1930.)

Two or more distinct rights cannot be joined in mandamus. (Haskins-Board, 51 M. 406; Ohlson-Durfrey, 82 M. 213.) The same rules of "pleading and procedure applicable to actions in the circuit court" are followed. (Chatters-Board, 73 M. 351; Sec. 2848-9 code 1892.)

LAW DAY

Plans are being made to hold the annual Law Day at Ole Miss on Thursday, the 9th of March. Tentative plans for the day's activities call for a speaker, who has not yet been chosen, luncheon at the University Dining Hall and a dance that evening at the Tea Hound.

The faculty and members of the student body of the Law School are anxious that as many members of the bar as can attend will be on hand for the festivities of the day.

NELSON CAUTHEN,
President of the Law School.

TO THE MEMBERS OF THE STATE BAR:

The Law School of the University of Mississippi takes pleasure in advising you that at the annual meeting of the Association of American Law Schools, held in Chicago, December 28 to 30, 1932, this school by a unanimous report of the Executive Committee of the Association, after an inspection first made to the Association, was unanimously reinstated as a member of the Association.

This gives to the school the rating and rank of the greatest law schools of the nation. Work done in this school will now receive recognition and credit will be given for it in every law school in the country.

The school has also been placed on the list of its accredited schools by the Council on Legal Education of the American Bar Association.

Every member of the bar has reason to be proud of the rating given the State's School of Law.

T. C. KIMBROUGH, *Dean.*

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NOTE AND COMMENT

CONTRACTS—PART PERFORMANCE AS ACCEPTANCE IN BROKER'S UNILATERAL CONTRACT.—In a comparatively recent Mississippi case[1] an owner of local real estate, living in a distant city, in reply to an inquiry of a broker, wired as follows: "Retel[2] offer bungalow six thousand cash five per cent you until November first." It seemed to be conceded for the purposes of decision that the telegram indicated that the defendant offered the exclusive right of sale to the broker until November first at the above commission.[3] The lower court refused evidence showing that defendant had sold the property through another agent before receiving a wire from plaintiff that he had sold the property pursuant to the offer in the telegram. On appeal the holding of the lower court was reversed. The Supreme Court apparently based its decision on the ground that there was no meeting of the minds of the parties since the broker did not reply to the telegram above set forth.

The above reasoning seemingly overlooks the intent of the offeror in sending the telegram, namely to create a unilateral contract. In such cases the usual custom is that the owner of land exchanges his promise to give an exclusive right of sale and to pay a commission for the act of selling the land within the prescribed limit, and not for a promise by the broker to attempt to sell.[4]

In unilateral contracts, such as the one above, there is no obligation on the offeror to fulfill his promise until the act asked for has been completed in the manner prescribed. However, it is generally held that, although the promisee is not obliged to complete performance after undertaking the same, once he has entered into substantial performance of the act, the promise of the offeror must allow him a reasonable or else the alloted time in which to perform his part of the bargain.[5] Once the act is completed, the contract is binding, and the offeror must fulfill his promise under the terms agreed.

Assuming that the parties intended a unilateral contract, what is the significance in the instant case? From one arguable view point, a unilateral contract with a condition precedent was intended. Thus in effect the offer

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1 Hollister v. Frellsen, 148 Miss. 568, 114 So. 385.

2 Regarding telegram.

3 148 Miss., at page 575: "Had he accepted Hollister's proposition, a different question would have arisen, but without notice to Hollister of an acceptance of this limit—if it be considered a time limit—he proceeded to negotiate without obligating himself in any manner to Hollister."

4 Act required, no promise necessary—see Attix v. Pelan, 5 Iowa 336; Singleton v. O'Blenis, 125 Ind. 151, 25 N. E. 154; Kimmel v. Skelly, 130 Cal. 555, 62 Pac. 1067; Lapham v. Flint, 86 Minn. 376, 90 N. W. 780; Schoenman v. Whitt, 117 N. W. 851; Howard & Brown Realty Co. v. Barnett, 206 S. W. 417; Oregon Home Builders v. Crowley, 87 Oregon 517, 171 Pac. 214.

Notice of acceptance not necessary generally—see Perkins v. Hadsell, 50 Ill. Reports 216; Schmitt v. Weil, 46 Ind. Reports 264, 92 N. E. 178; Williams v. Emerson Brantingham Imp. Co., 198 S. W. 425; Ross v. Leberman, 298 Pa. 574, 148 Atl. 858.

5 Restatement of the Law of Contracts, Section 45; Superior Consolidated Land Co. v. Bickford, 93 Wis. 220, 67 N. W. 45.

might be stated: "In consideration of your acting as my agent and expending time, effort, and money in attempting to effect a sale, I promise to deliver title to your purchaser, to give you exclusive right of sale, and to pay you a commission; all of this, however, on the condition precedent of your final securing of a purchaser, ready, willing and able to buy.[6] The objection to such an interpretation is that it sublimates the principal matter of the whole contract, the actual securing of a purchaser; and too, it separates the act of attempting to procure from the act of procuring, when in reality they constitute one continuing act.

The just construction of the offer, it seems, is to anticipate unilateral relations—with the offer substantially this: "I will deliver title, give you exclusive right of sale,[7] and pay you a commission for your procuring a ready, willing, and able purchaser for me." The attempt to procure and the actual procuring are an indivisible whole, and constitute the act for which the offeror bargained his promise.

In the present case, what can be regarded as the offeree's rights after expending time, effort, and money in his attempt to procure a purchaser? The just view, it seems, and the one supported by a great number of the courts is to hold the offer irrevocable on the part of the offeror on the basis of substantial performance by the offeree[8] even though the offeree has the power of abandoning the matter at will. This principle was followed in a decision rendered by the Mississippi Supreme Court several years before that of the principal case.[9]

Accordingly, the acceptance by the offeree created all the elements of a good contract. An irrevocable offer had already been created at the time of sale by the second broker. It would appear that the evidence attempting to show a revocation by prior sale was rightfully refused in the lower court.

SIDNEY MAY.

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6 For principle see 27 Yale Law Journal 382.

7 For possibility of revocation by principal in exclusive right cases, see 28 Yale Law Journal 575, where principle is stated that in cases of exclusive right revocation is impossible after substantial performance; while in cases of exclusive agency revocation is possible under certain conditions—and then, unjustly.

8 Blumenthal v. Goodall, 89 Cal. 251, 26 Pac. 906; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086; Blumenthal & Co. v. Bridges, 91 Ark. 212, 120 S. W. 974; Mercantile Trust Co. v. Lamar, 140 Mo. App. 353, 128 S. W. 20; Hardwick v. Marsh, 96 Ark. 23, 130 S. W. 524; Sill v. Ceschi, 167 Cal. 698, 140 Pac. 949; Kruse v. Ferber, 91 N. J. Law 470, 103 Atl. 409; Gossett v. McCracken, 189 N. C. 115, 126 S. E. 117.

9 Sunflower Bank v. Pitts, 108 Miss. 380, 66 So. 810.